SUPREME COURT, U. S.

Supreme Court
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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

JANUARY TERM, 1975

No. 74-1097

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

HENRY A. KISSINGER, Secretary of State

and

JULIUS L. KATZ, Deputy Assistant Secretary of State,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consumers Union of United States, Inc. ("Consumers Union"), on behalf of itself and its members, consumers of steel products, hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 2, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 506 F.2d 136 and set forth in the appendix at pages

1a-29a.[1] The opinion of the District Court is reported at 352 F. Supp. 1319 and is set forth in the appendix at pages 30a-35a.

JURISDICTION

The opinion of the Court of Appeals for the District of Columbia Circuit was rendered on October 11, 1974. A timely petition for rehearing and suggestion for reconsideration *en banc* was denied on December 2, 1974, and this petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in order to regulate foreign commerce through agreements establishing steel quotas, the Executive must comply with express substantive and procedural requirements in a Congressional statute authorizing the Executive to negotiate such agreements.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) United States Constitution, Art. I, § 8, ¶ 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . .

(2) United States Code, Title 19, Sections 1901 and 1982. (The Escape Clause of the Trade Expansion Act of 1962, Sections 301 and 352)[2]

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[1] Citations to the petition's appendix are in the form "App. ". A certified copy of the Joint Appendix printed for use of the Court of Appeals has been furnished to this Court, and references to it are in the form, "D.C. Cir. App. ".

[2] These provisions have been modified, in respects not relevant to this case, and have been recodified, by the Trade Act of 1974, Pub. L. No. 93-618, §§ 201, 202 and 203 (Jan. 3, 1975), 19 U.S.C. §§ 2251, 2252, and 2253.

The complete texts of these sections are reproduced at App. 36a-40a. The most relevant parts provide:

19 U.S.C. § 1901(b)(1)

> Upon the request of the President upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon the filing of a petition under subsection (a)(1) of this section [by the industry], the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.

19 U.S.C. § 1901(d)(1)

> In the course of any investigation under subsection (b)(1) of this section, the Tariff Commission shall, after reasonable notice, hold public hearings and shall afford interested parties opportunity to be present, to produce evidence, and to be heard at such hearings.

19 U.S.C. § 1982(a)

> After receiving an affirmative finding of the Tariff Commission under section 1901(b) of this title with respect to an industry, the President may, in lieu of exercising the authority contained in section 1981 (a)(1) of this title [to impose a tariff or quota] negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing or threatening to cause serious injury to such industry, whenever he determines that such action would be more appropriate to prevent or remedy serious injury to such industry than action under section 1981(a)(1) of this title.

STATEMENT OF THE CASE

The subject of this litigation is detailed, written agreements negotiated and concluded in 1972 between the Department of State and European and Japanese steel producers under which the producers restrain sales to the United States (D.C. Cir. App. 30a-47a). Such agreements constitute—in terms of the number of parties, the volume of trade, impact on import levels and prices [3]—perhaps the most significant restraints ever concluded by this country. The agreements specify detailed tonnage and percentage limitations according to product line; include limitations on the geographic distribution of steel sales within the United States; obligate the signatory European producers to "use their best efforts" to "induce" non-signatory producers to limit their shipments to the United States of specified steel mill products to detailed tonnage limitations; and, provide for communication to permit, *inter alia*, upward adjustment of the specified limitation on steel pipe imports whenever American steel producing companies are unable to fulfill the demand in the American market. The undertaking of the Japanese producers is conditioned upon the understanding that their "share of total United States imports of steel mill products, will not be disadvantageous" as compared with the undertakings of the other signatory producers; and, the undertakings of the European producers include the understanding that there will be consultation with representatives of the U.S. Government in the event that the European producers believe that "they have been placed in a disadvantagous position with respect to other exporters of steel to the United States by developments in the international steel market."

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[3] In 1971, steel sales amounted to $17.2 billion, and imports represented 18% of the domestic market or 18 million tons (D.C. Cir. App. 190a).

In 1968, the Johnson Administration concluded that steel imports should be reduced because it believed excessive imports were injuring the domestic steel industry and causing market disruption (D.C. Cir. App. 114a-115a and 186a). After examining possible alternatives to achieve this result, the Department of State chose to negotiate restraints with steel producers of Japan and the European Community. A quota agreement[4] in the form of a joint undertaking by the producers to restrain their steel exports to the United States during a three-year period was concluded in 1968 (D.C. Cir. App. 172a-184a).

Early in 1970, domestic steel producing interests privately urged the Executive branch to open negotiations with the foreign steel companies for a renewal of the steel quota agreements. New negotiations were undertaken over a one and one-half year period and eventually resulted in agreements, dated May 2, 1972, under which steel sales to the U.S. were restrained during 1972, 1973 and 1974. The 1972 agreements involved far more restrictive and detailed quotas than did those negotiated in 1968.

While Congress has authorized the President to negotiate quota agreements, the Congressional legislation requires that specified criteria be met and procedural safeguards followed before any such negotiation. The purpose of these requirements is to ensure that the views of all economically affected parties, including consumers, will be properly presented and considered in the decision-

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[4] The restraints on steel and similar restraint undertakings on other commodities are variously termed "restraint arrangements", "voluntary restraint arrangements", "restraint agreements", and "orderly marketing agreements". In this petition, the term "quota agreements" will generally be used. The adjective "voluntary" is, of course, a misnomer to the extent it implies anything further than that these parties, like parties to any contract, voluntarily entered into their obligations.

making process, and that restraints are only imposed when consistent with the legislative purpose. At no time were the procedural requirements of the specific law authorizing quota agreements to alleviate injury of a domestic industry or of any other trade law complied with in connection with the steel quota agreements. Although the quota agreements were negotiated after detailed, private consultation with American steel interests (App. 11a), there was no public notice of an intention to impose restraints on steel imports, no opportunity for public comment on such a proposal, no public hearings, no public record, and no public determination why such restraints were needed.

On May 24, 1972, petitioner Consumers Union filed suit challenging the legality of the 1972 steel quota agreements on two grounds. First, Consumers Union maintained that the respondents acted illegally in concluding quota agreements of the kind in question without complying with the substantive criteria and procedural safeguards enacted by Congress for such agreements. Alternatively, petitioner maintained in a separate count that the agreements were an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Thereafter, petitioner amended the complaint dropping the Sherman Act count, but continuing to maintain that the agreements could not be immunized by the Executive from the antitrust laws.

In a Memorandum Opinion, Declaration and Order, dated January 8, 1973, the District Court concluded that the Executive was not precluded by the trade laws from negotiating the steel quota agreements.[5] But the District Court ruled that the President did not have the power to secure action which would be in violation of the

[5] The District Court heard the matter on cross-motions for summary judgment, and the facts are not in dispute.

Sherman Act or any other law enacted by Congress or to grant immunity from such laws.

The Court of Appeals issued a divided opinion. Both majority and dissent agreed that the antitrust issue disappeared from the case when petitioner amended its complaint and dropped the count addressed specifically to its antitrust claim. The Court of Appeals thus vacated the District Court's declaration concerning the antitrust laws. With respect to the trade issue, the majority found that the President possessed inherent authority to regulate commerce by negotiating trade restraints of the kind in question; that Congress had most likely occupied the field of "enforceable" import restraints; but that no conflict existed between the steel quota agreements and Congressional legislation in the trade area since the steel quotas were not "enforceable".

Judge Leventhal, dissenting, found otherwise. He stated that the steel restraint arrangements were inconsistent with Congressional statutes entailing "a comprehensive scheme occupying the field of import restraints" involving a prescribed "procedure with safeguards and right of comment by affected interests" (App. 11a). He also found that Congress had expressly authorized quota agreements of the very kind in this case; but the relevant legislation required procedures not undertaken by the respondents before negotiating and concluding the steel quota agreements. Noting that the steel agreements were, in any event, enforceable, he concluded they were subject to procedures and requirements in the Trade Expansion Act which were not complied with, and were therefore unlawful.

REASONS FOR GRANTING THE WRIT

Petitioner only seeks review of the Court of Appeals decision involving the trade law issue.[6] Petitioner pre-

[6] The case in the Court of Appeals was a consolidation of seven civil actions with the Secretary of State and the Deputy Assistant

sents a clearly defined, important question of "federal law which has not been, but should be, settled" by this Court:[7] May the Executive regulate foreign commerce through detailed, written agreements establishing steel quotas in violation of the substantive criteria and procedural requirements provided in the statute authorizing the negotiation of such agreements? Furthermore, petitioner seeks review because the majority decision is "in conflict with the decision of another court of appeals" on the same matter.[8]

Petitioner respectfully submits this Court should grant *certiorari* and hold that when Congress, consistent with an historical pattern, legislates that import barriers, including quota agreements, may be achieved only if certain substantive criteria are satisfied and procedural safeguards followed, the Executive may not act in violation of those criteria and safeguards, and, therefore, the steel quota agreements are invalid.

This sharply focussed question is of great importance. The Court of Appeals decision represents an unprecedented inroad into the traditional authority of the Congress in the area of trade regulation and, if permitted to stand, will allow the respondents to continue blithely to disregard congressionally mandated criteria and procedural safeguards in restricting this nation's imports. As Judge Leventhal warns, if defendants' theory is left standing, the President will be able to utilize it "with all

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Secretary of State as defendants in one action involving the trade law issue and a second action involving the antitrust issue, and the domestic and foreign steel companies as defendants in the others. The petitioner seeks review only of the Court of Appeals decision with respect to the trade issue and hence only the civil action involving the Department of State defendants, No. 73-1132.

[7] Supreme Court Rule 19.

[8] *Id.*

industry on every aspect of domestic, as well as foreign commerce. This is dangerous doctrine" (App. 21a).[9]

Petitioner contends, further, that *certiorari* should be granted because the Court of Appeals majority has rendered a decision in conflict with the decision of the Fourth Circuit in *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), on the same matter of Executive authority to conclude quota agreements.

I. The Effect Of The Majority Decision Is To Permit The Executive Branch To Regulate Commerce In Violation Of The Substantive Policies And Procedural Safeguards Established By Congress.

It is undisputed that the steel quota agreements, the subjects of this litigation, regulate commerce.[10] The very

[9] Although the steel quota agreements originally challenged in 1972 expired on December 31, 1974, the case is not moot. The Department of State has declined to state it will not renew the agreements. The renewal in 1972 did not occur until the earlier agreeemnts had lapsed for over five months. The Court should not find this case moot, for to do so would prevent petitioner from ever successfully challenging the short-term steel restraint arrangements, would leave the Department of State free to continue to follow what it claims is, over recent history, a pattern of restraint arrangements based on inherent authority (App. 21a), and would permit the continuation of an invalid instrusion by the Executive into the Constitutional powers of Congress. Quota agreements are invariably short-term since they are used as interim solutions (D.C. Cir. App. 115a). In situations like this, when limited duration government actions are involved, this Court has regularly reached the merits on the rationale that otherwise the actions would evade review. *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). The Court has applied that doctrine particularly where, as in this case, repeated violations are involved. *U.S.* v. *W.T. Grant Co.*, 345 U.S. 629 (1953); *Roe* v. *Wade*, 410 U.S. 113 (1973).

[10] To put this case in proper context, it is important to understand what this case does *not* involve. It is not a situation in which the Department of State's objectives are related to political foreign policy issues; rather, the respondents' own characterization

purpose of the agreements "was to manage commerce between the United States and the foreign producers involved . . . ." (App. 13a-14a). The foreign steel producers, after an extended formal negotiation, committed themselves to limit sales to the United States, took their obligations under the agreements seriously, and did, in fact, restrict sales.

The Constitution, by Article I, § 8, ¶ 3, confers on Congress plenary powers over foreign and interstate commerce. Congress has delegated to the Executive, under appropriate guidelines and appropriate procedural safeguards, primary responsibility for carrying out the Nation's legislated trade policies.[11]

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of their objectives places their actions solely in the area of international commerce, with a purpose to protect a domestic industry from competition (D.C. Cir. App. 112a-124a and 185a-186a). The case is not one in which an embargo or some other action affecting trade is incidental to Presidential objectives aimed at traditional "foreign policy" goals such as avoiding the appearance of taking sides in a foreign dispute (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); responding to war-like acts by a foreign enemy (*Little* v. *Barreme* (*The Flying Fish*)), 6 U.S. (2 Cranch) 170 (1804)); or participating in the imposition by an international organization of economic sanctions against a trouble-making country (*South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965)). It is, instead, a case of Executive action aimed at protecting a domestic industry from the competition of foreign imports; preserving our liberal trade policy; avoiding a precedent for restraints of imports other than steel; and, avoiding the danger of retaliation against our exports under GATT (D.C. Cir. App. 112a-124a and 185a-186a). In such circumstances Executive action has traditionally been strictly limited by the parameters of *Congressional delegation*. See, *e.g.*, *Star-Kist Foods, Inc.* v. *United States*, 275 F.2d 472 (C.C.P.A. 1959); *Star Industries, Inc.* v. *United States*, 320 F. Supp. 1018 (Cust. Ct. 1970), *rev'd on other grounds*, 462 F.2d 557 (C.C.P.A.), *cert. denied*, 409 U.S. 1076 (1972).

[11] See, e.g., the House Report for the Trade Agreements Act of 1934, which includes the observation:

> CONGRESS DETERMINES THE POLICY—THE PRESIDENT EXECUTES THE POLICY OF CONGRESS

[Footnote continued on page 11]

Respondents claim, in spite of Article I, § 8, ¶ 3, that the Executive possesses inherent authority over foreign commerce to the extent utilized in the steel quota agreements.[12] However, the question of the extent of in-

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[11] [Continued]

> In order that this purpose may be carried out, in other words, in order that the policy declared by Congress may be appropriately executed, certain powers are accorded to the Executive Branch of the Government, the President.
>
> The official of the Government who represents all the people, having the entire United States as his constituency, is given the responsibility *for carrying out the will of Congress.* This is the appropriate method in a government that exists, of, by, and for the people.

H.R. Rep. No. 1000, 73d Cong., 2d Sess. 14 (1934) (emphasis added)

This same understanding of the Constitutional scheme is reflected most recently in the Senate report on the Trade Act of 1974. See S. Rep. No. 1298, 93d Cong., 2d Sess. 14-15 (1974).

[12] No case law, however, supports that proposition. The only Constitutional provisions which speak to Presidential foreign relations powers are—(1) "The President shall be Commander in Chief . . . ," Art. II, § 2, ¶ 1; (2) "[H]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ," Art. II, § 2, ¶ 2; and (3) "[H]e shall receive Ambassadors and other public Ministers," Art. II, § 3. From this, a foreign affairs power has properly been implied, but the quantum leap of adducing authority to establish foreign commerce policy cannot be made. Petitioner has been able to find only two cases involving Executive action in the area of trade regulation without statutorily delegated authority, and in both cases it was found that the Executive acted unlawfully. *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (Cust. Ct. 1974). All other cases in the area involve Executive action under Congressionally delegated authority; and each of those reflects the unvarying assumption that the President cannot act in such area, except where there has been a delegation by Congress. See, *e.g.*, *Field* v. *Clark*, 143 U.S. 649, 690-691 (1892); *Star-Kist Foods, Inc.* v. *United States*, 275 F.2d 472 (C.C.P.A. 1959); and *see generally, The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813); *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928). The cases relied upon by the respondents in support of independent Executive authority in the area of trade regulation, such as *United*

herent Executive power need not be reached in the present case *if* the Court finds, as petitioner believes it must, that Congress has legislated on the subject in question. Here, as petitioner will demonstrate below and as Judge Leventhal properly decided, Congress has so legislated and, indeed, has established the country's trade policy in both basic and detailed terms. The Executive, in concluding the steel quota agreements, has acted in contravention of that basic policy and specific criteria and procedures. When the Congress exercises its Constitutional prerogative to regulate commerce, there is no question that Presidential action contrary to basic legislative policy and specific criteria is unlawful,[13] and, likewise, failure to follow explicit procedural safeguards invalidates any such action.[14]

States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), in fact involve delegations of authority by Congress to the President. And, in those cases where no delegation has been found necessary, *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942), the President was held to have authority to take actions having an incidental effect on commercial transactions only because these actions were an essential part of an explicit Constitutional power to receive Ambassadors, *i.e.*, recognize foreign governments.

[13] The Supreme Court articulated this doctrine in the Steel Seizure case:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Youngstown Sheet & Tube Company v. *Sawyer*, 343 U.S. 579, 637 (1952) (concurring opinion of Mr. Justice Jackson). See also *The Flying Fish*, 6 U.S. (2 Cranch) 170, 177-178 (1804); *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, *supra*; *Rich* v. *Naviera Vacuba S.A.*, 197 F. Supp. 710, 717 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

[14] See, *e.g.*, *Best Foods Inc.* v. *United States*, 218 F. Supp. 576 (Cust. Ct. 1963); *Schmidt Pritchard & Co.* v. *United States*, 167 F. Supp. 272 (Cust. Ct. 1958).

Congress has comprehensively legislated in the trade field, starting with the passage of the Tariff Act of 1930.[15] Two aspects of U.S. trade law are fundamental. First, the overriding objective of legislative trade policy has been to encourage reductions in trade barriers, in order to open markets for American products abroad, and to encourage healthy import competition for our industries at home.[16] Second, deviations to protect domestic

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[15] Tariff Act of 1930, Ch. 497, 46 Stat. 590, 19 U.S.C. §§ 1001-1654; Trade Agreements Act of 1934, Ch. 474, 48 Stat. 943, 19 U.S.C. §§ 1351-1354; Trade Agreements Extension Act of 1943, Ch. 118, 57 Stat. 125; Trade Agreements Extension Act of 1948, Ch. 678, 62 Stat. 1053; Trade Agreements Extension Act of 1949, Ch. 585, 63 Stat. 697; Trade Agreements Extension Act of 1951, Ch. 141, 65 Stat. 72; Trade Agreements Extension Act of 1955, Ch. 169, 69 Stat. 162; Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673; Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 19 U.S.C. §§ 1801-1991; Trade Act of 1974, Pub. L. 93-618 (Jan. 3, 1975) 19 U.S.C. §§ 2111-2487. Agricultural Act of 1956, Section 204, 7 U.S.C. §1854; Agricultural Adjustment Act of 1933, Section 22, 7 U.S.C. § 624.

[16] This "free trade" policy reached its high point in the Trade Expansion Act of 1962, whose objectives were perhaps best described in President Kennedy's message to Congress urging its enactment:

> Our efforts to prevent inflation will be reinforced by expanded trade. Once given a fair and equal opportunity to compete in oversea markets, and once subject to healthy competition from oversea manufacturers for our own markets, American management and labor will have additional reason to maintain competitive costs and prices, modernize their plants, and increase their productivity. The discipline of the world marketplace is an excellent measure of efficiency and a force to stability. To try to shield American industry from the discipline of foreign competition would isolate our domestic price level from world prices, encourage domestic inflation, reduce our exports still further, and invite less desirable governmental solutions.
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> * * * *
>
> Increased imports stimulate our own efforts to increase efficiency, and supplement antitrust and other efforts to assure competition. . . . *Message From the President of the United States Relative to the Reciprocal Trade Agreements Program*, Hearings on H.R. 9900 Before the House Comm. on Ways and Means, 87th Cong., 2d Sess., at 3 and 5 (1962).

industry against import-related injury are only authorized where specific, statutory substantive criteria are satisfied, and only after compliance with relevant procedural safeguards. As Judge Leventhal emphasized with regard to procedural safeguards:

> The Congressional pattern makes clear that such executive action [the imposition of restraints, including imposition through quota agreements] is tolerated only if it is accompanied and safeguarded by procedural protections that ensure a right of comment by those whose interests may be affected. This not only avoids the vice of complete secrecy within the Government, it also avoids the vice of cozy confidentiality, in which the public is informed only when the matter is a fait accompli. App. 18a.

In the present case, the respondents stated that quota protection was necessary to protect the domestic steel industry from injury caused by imports (D.C. Cir. App. 185a). In what is known as the Escape Clause (Sections 301, 302, 351 and 352 of the Trade Expansion Act of 1962, 19 U.S.C. §§ 1901, 1902, 1981 and 1982),[17] Congress set forth the criteria which must be met and the procedures which must be followed (including a Tariff Commission investigation, a determination, and public hearings) before protection can be provided for injury resulting from imports. Once those criteria are met and those procedures followed, the President is authorized to impose a tariff or a quota (19 U.S.C. § 1981) or to negotiate an orderly marketing agreement (19 U.S.C. § 1982)[18] of the type which respondents have concluded

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[17] The Escape Clause has been reenacted in the Trade Act of 1974, see note 2, *supra*, and again authorizes the President to achieve protection by negotiating restraint agreements to prevent injury to domestic industry and labor.

[18] In fact, concern in Congress about the inadequacy of non-public consideration by cabinet committees of the kind relied upon in this case played a significant role in the enactment of the Orderly Marketing Provisions. Hearings on H.R. 9900 Before the House Comm., on Way and Means, 87th Cong., 2d Sess., Pt. 6, pp. 3854, 3855.

with respect to steel. The Orderly Marketing Agreement provision was a tailor-made response [19] to Executive branch concern "about the serious problem that excessive imports have posed for our steel workers and our steel industry" (D.C. Cir. App. 185a), and to the stated objective of "enabl[ing] domestic steel producers to make their plans with confidence that imports will not be disruptive in the domestic market" [20] (D.C. Cir. App. 186a).

In sum, Congress has authorized the President to negotiate restraint arrangements of the type utilized for steel, and to alleviate the very problems respondents believe to exist in the steel industry.[21] But Congress has

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[19] Respondents originally contended in the District Court that they were exempt from the Escape Clause and the Orderly Marketing Agreement provision because the steel industry could not meet the test of that clause—it could not show, they believed, that injury was concession-related. Respondents changed their emphasis and developed an enforceability argument when petitioner pointed out that steel was, indeed, a concession item. But, the Department of State's argument is, in any event, preposterous on its face. The Department's position, quite simply, is that in any situation where an industry cannot meet the criteria carefully defined by Congress, the President is still free to achieve import restraints, and, indeed, he is free to do so without regard for any procedural requirements whatever. It would appear, then, that the more Congress attempts to legislate free trade and to define situations in which the President may achieve import restraints pursuant to procedural requirements, the more it thereby expands the circumstances under which the President may deviate from the Congressional policy of free trade without regard for any criteria or procedural requirements. The paradoxical result is that if an industry is injured, it must follow procedures; and if it is not injured, it may simply have the Department of State negotiate the same quota agreements without the inconvenience of a Tariff Commission investigation and hearing.

[20] Senator Muskie, who introduced the provision in the Senate, described it as providing ". . . a tool for the President to use . . . in giving domestic manufacturers a breathing space in which to adjust to changing competitive conditions" 108 Cong. Rec. 19859 (1962) (Remarks of Senator Muskie). For its purpose, see S. Rep. No. 2059, 87th Cong., 2d Sess., 1962 U.S. Code Cong. & Ad. News at 3115.

[21] The Congress has also enacted Section 232 of the Trade Expansion Act of 1962 (as amended by Section 127 of the Trade Act

granted such authorization only in the context of substantive criteria and procedural safeguards, not utilized in connection with steel, to assure that those seeking a deviation from free trade policy could demonstrate that they were entitled to relief. The steel quota agreements are invalid because, in concluding them, the respondents ignored the requirements imposed by Congress.

The majority opinion of the Court of Appeals concluded that Congress had most likely by statute occupied the field of "enforceable" import restrictions, "if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution" (App. 8a). The majority, however, concluded that the steel quota agreements were unenforceable (i.e., because they did not "purport" to be enforceable contracts or because observance allegedly could not be compelled at the border), and therefore did not conflict with the trade laws (App. 8a).[22]

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of 1974), the National Security Provision. Where the President determines that an article is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security", he is authorized, after following specified procedures, to:

> . . . take such action, and for such time, as he deems necessary to adjust the imports of such article . . . so that such imports will not so threaten to impair the national security. 19 U.S.C. § 1862(b).

Respondents claim this provision could not be utilized because the national security aspects were insufficient to trigger the provision (D.C. Cir. App. 116a).

[22] The concurring opinion of the Court of Appeals likened the steel restraint arrangements to "jawboning" and hence concluded them unenforceable. But the facts of this case are far from a "jawboning" situation. The Department of State's actions did not merely involve approaches or exhortations or expressions of view or attempts to "reason together". Involved here were painstaking negotiations over a period of many months between foreign steel representatives and a U.S. delegation, leading to the creation of clear-cut obligations in a detailed written restraint agreement.

The majority is patently incorrect in framing the question in terms of "enforceable" and "unenforceable" restraints. The majority's novel doctrine, conceived and articulated without reference to any judicial precedent, is inconsistent both with the plain language of the relevant statutory provision and the purpose and logic of the Congressional scheme.

The Orderly Marketing Agreement provision of the Escape Clause, 19 U.S.C. § 1982(a), plainly covers *all* quota agreements. It states the President may negotiate quota agreements only after "receiving an affirmative finding of the Tariff Commission under Section 1901 (b)" that imports into the United States of the article are causing or threatening to cause serious injury to such industry. The language does not exempt a particular type of restraint agreement. It says simply that the requirement of an affirmative finding must be met for quota agreements whether or not the President subsequently chooses to invoke the separate authority to exclude goods shipped in excess of the quota provided in the agreement.

Not only is the language of the statute plain, but its purpose and logic wholly refute the majority's holding. Congress has, as clearly as is possible, stated that there shall be free trade, except where certain circumstances exist justifying a deviation. The majority has contrived an unprecedented and unsupported distinction which imputes to Congress the bizarre intention to exempt restraints which can and have undercut the very purpose of its comprehensive free trade legislation. For, an "unenforceable" quota agreement is the functional equivalent of an "enforceable" agreement. As Judge Leventhal stated: "Here the undertakings have an economic effect that parallels that of import quotas proclaimed by the President" (App. 14a). In the case of the (allegedly "unforceable") steel quota agreements, as in any "enforceable" agreement, the foreigners assumed a clear-cut ob-

litigation, stated they would comply with that obligation, and in fact reduced sales to the U. S. in accordance with their obligations. If an "unenforceable" or "enforceable" restraint agreement works properly, the issue of enforcement never arises. The distinction thus not only fails to reflect the realities of international trade relations, but files in the face of the fundamental doctrine that Presidential power must yield to Congress' regulation of commerce.[23]

II. The Decision Of The Court Of Appeals Conflicts With The Decision Of Another Court of Appeals On The Same Matter Of Executive Authority To Conclude Quota Agreements.

On one prior occasion a federal appellate court has addressed itself directly to the question of the Executive's authority to negotiate and conclude a voluntary quota agreement without complying with the criteria and procedures of an existing statute authorizing the imposition of restraints. In *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), Chief Judge Parker unequivocally held (1) that a "voluntary" quota agreement negotiated by the Executive was void because the Executive failed to comply with statutory criteria and procedures; and (2) that the Executive could not negotiate a "voluntary" quota agreement on the basis of inherent Executive authority.

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[23] While petitioner believes that the majority's distinction is erroneous, nevertheless the majority's characterization of the steel quota agreements as unenforceable is incorrect. As Judge Leventhal notes (App. 15a), they involve written commitments which, under the doctrine of promissory estoppel, can be enforced in U.S. courts. See, *e.g.*, *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1880); *Goodman* v. *Dicker*, 169 F.2d 684, 685 (D.C. Cir. 1948). Furthermore, they are enforceable under international law in an international forum. See *Eastern Greenland Case*, *Denmark* v. *Norway*, [1938] P.C.I.J., Ser. A/B, No. 3.

Under Section 22 of the Agricultural Adjustment Act of 1933, as amended, 7 U.S.C. § 624, the Executive was authorized, after due investigation and appropriate findings by the Tariff Commission, to proclaim quotas on agricultural imports in order to protect threatened price support programs. The Secretary of Agriculture, without following procedural safeguards, sought to protect a domestic commodity program from imported Canadian potatoes by entering into a "voluntary" quota agreement with Canada, under which the Canadian government agreed to, and did, require that exporters include in contracts provisions limiting use of potatoes to be sold to customers in the United States. The United States sued such a customer for failure to comply with such a contractual provision.

The Fourth Circuit held that the "voluntary" quota agreement was invalid. It said:

> We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress . . . The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. . . . 204 F.2d 659-660.

During the course of the argument, the government contended that, quite apart from the statute, it had inherent authority to enter into a voluntary quota agreement. The Court give this argument short shrift:

> [W]hile the President has certain inherent powers under the Constitution . . ., the power to regulate interstate and foreign commerce is not among the powers incidental to the Presidential office, but is expressly vested by the Constitution in Congress

> * * * Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone . . . . Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy. 204 F.2d at 659, 660.

Finally, the Court emphasized that:

> Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with it was void. 204 F.2d at 659.

In *Guy Capps*, as here, Congress had enacted a statute addressed to the problem of concern to the Executive branch. The statute in *Guy Capps* authorized trade restrictions when imports threatened programs under the Agricultural Adjustment Act; in the present case, the "Escape Clause" authorizes trade restrictions (of the exact type used, i.e., negotiated quota agreements) when imports threaten to cause or have caused injury to a domestic industry—the very problem that motivated the Department of State to act.

The conclusion that respondents lacked authority to negotiate the steel restraint agreements is far more compelling than the decision reached by the *Guy Capps* Court in voiding the potato agreement for two reasons. There was nothing in the Agricultural Adjustment Act, nor in any other statute in existence *at that time*, which dealt with the subject of voluntary quota agreements (or, indeed, enforceable quota agreements). Nor was there any indication that Congress had contemplated an emergency situation, like that created by the bumper potato crop, which could not await the completion of a Tariff Com-

mission investigation when it enacted Section 22. Thus, it could quite reasonably be argued in *Guy Capps* that both the particular import problem at issue and the kind of action taken by the Executive branch in response were outside the contemplation of Congress in Section 22 or in any other statutory provision. Indeed, it could be said in that case that the only way for the Executive branch to accomplish the purposes of Section 22 was to take the action which it took. Nonetheless, the Court of Appeals found that action invalid.

By contrast, here, the respondents have not been able to argue that the Department of State based its "unenforceable" actions upon the very criteria specified in the statutory provisions which authorized action of the kind in question; they have been compelled instead to argue that the Department chose the route of an "unenforceable" voluntary quota agreement because the statutory criteria authorizing negotiation of an "enforceable" voluntary quota agreement would have been difficult to meet. And here, respondents have not been able to argue that adherence to the procedural prerequisites for "enforceable" Executive action would have meant frustration of the statutory objective because of an emergency situation not contemplated by Congress; they have been compelled instead to argue that the President acted outside the statutory criteria in order to achieve a *departure* from statutory policy.[24] To let the steel quota agreements

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[24] Furthermore, the *Guy Capps* case cannot be distinguished from the present case on the grounds that *Guy Capps* involved "enforceable restraints" while the steel restraint arrangements are "unenforceable". First, the type of enforceability of particular importance to the majority opinion in this case is halting violative importations at the border. The *Guy Capps* agreement did not provide for such enforcement, and the government did not attempt such enforcement. Second, the remedy sought in the lawsuit was predicated, not on the underlying restraint arrangement, but on a subsequent private contract. The government could, in the case of steel, seek precisely the same type remedy. Following the con-

stand thus would be plainly in conflict with the Fourth Circuits decision in *Guy Capps*.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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Dated: March 3, 1975
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clusion of the steel restraint arrangements, various foreign steel companies, in cartel fashion, allocated among themselves the quota provided their country in the arrangements. If a foreign company were to ship to the U.S. more than its allocated share, the U.S. would be in precisely the same position as it was in *Guy Capps*, and could sue as a third party beneficiary, alleging violation of the implementing cartel agreement and seeking damages for the overshipment or injunctive relief.

APPENDIX

APPENDIX

CONSUMERS UNION OF U. S., INC.

v.

Henry A. KISSINGER, Secretary of State, et al., United States Steel Corporation, Appellant.

CONSUMERS UNION OF U. S., INC.

v.

Henry A. KISSINGER, Secretary of State, and Julius L. Katz, Deputy Assistant Secretary of State for Economic Affairs, Appellants.

CONSUMERS UNION OF U. S., INC.

v.

Henry A. KISSINGER, Secretary of State, et al., American Iron and Steel Institute, Appellant.

CONSUMERS UNION OF U. S., INC., Appellant,

v.

Henry A. KISSINGER, Secretary of State, et al.

CONSUMERS UNION OF U. S., INC.

v.

Henry A. KISSINGER, Secretary of State, et al., British Steel Corporation, Appellant.

CONSUMERS UNION OF U. S., INC.

v.

JAPAN IRON AND STEEL EXPORTERS ASSOCIATION
and
Nippon Steel Corporation, Appellants.

CONSUMERS UNION OF U. S., INC.

v.

Henry A. KISSINGER, Secretary of State, et al., Fried. Krupp Huettenwerke, A.G., Appellant.

Nos. 73-1095 to 73-1097, 73-1132, 73-1133, 73-1135 and 73-1158.

United States Court of Appeals, District of Columbia Circuit.

Argued May 31, 1973.

Decided Oct. 11, 1974.

Rehearing Denied Dec. 2, 1974.

Consumers organization brought suit against the State Department, and foreign and domestic steel producers, individually and in association, challenging efforts by the Executive Branch to bring about reduction in steel imports by means of self-imposed limitations on foreign producers. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., entered memorandum of opinion, declaration and order in which it declared that the Executive had no authority to exempt the voluntary restraint agreements from the antitrust laws and that the Executive was not preempted and could enter into agreements or diplomatic arrangements with private foreign steel concerns so long as those undertakings did not violate legislation regulating foreign commerce, and cross appeals were taken. The Court of Appeals, McGowan, Circuit Judge, held that declarations in District Court's order with respect to antitrust exemption were required to be vacated since for all practical purposes the Sherman Act issue disappeared from the case when plaintiff stipulated its dismissal with prejudice, that without a proper delegation on part of Congress the President cannot increase or decrease tariffs or impose mandatory import quotas but that actions of the Executive in securing instant voluntary agreements were not a regulation of foreign commerce foreclosed to the Executive either by the Constitution or by the Trade Expansion Act.

Modified and affirmed.

Danaher, Senior Circuit Judge, filed concurring opinion; Leventhal, Circuit Judge, dissented and filed opinion.

1. Declaratory Judgment ⊂385

Declarations in district court's order that the Chief Executive had no authority to exempt from the antitrust laws voluntary arrangements whereby foreign steel producers would limit their imports into United States and that such arrangements were not exempt were vacated since Sherman Act issue had disappeared from suit challenging such arrangement when plaintiff stipulated its dismissal with prejudice; in any event since there was nothing in the re-

cord to show the Executive as purporting to grant such an exemption, such observations did not have the stature of a declaratory disposition of an actual controversy. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Customs Duties ⇐3

Trade Expansion Act of 1962 has as its principal purpose the stimulation of the economic growth of the United States and the maintenance and enlargement of foreign markets for its products. U.S.C.A.Const. art. 1, § 8, cl. 3; Trade Expansion Act of 1962, § 102 et seq., 19 U.S.C.A. § 1801 et seq.

3. Customs Duties ⇐6

Without a proper delegation, such as that contained in the Trade Expansion Act, the President may not increase or decrease tariffs, issue commands to the customs service to refuse or delay entry of goods into the country or impose mandatory import quotas; to make use of such delegated power the President is required to proceed strictly in accordance with the procedures specified in the statutes conferring the delegation; however, where he does not pretend to the possession of such power no such conformity is required. Trade Expansion Act of 1962, §§ 201, 221, 223, 301 et seq., 351, 352, 19 U.S.C.A. §§ 1821, 1841, 1843, 1901 et seq., 1981, 1982.

4. Commerce ⇐79
Customs Duties ⇐6

Actions of the Chief Executive in attempting to bring about reductions in steel import by means of self-imposed limitations on foreign producers, with President's actions taking form of letters stating the signatories' intention to limit exports of steel products to United States and to hold themselves ready to consult with representatives of United States Government when any problem or question might arise with respect to such voluntary undertaking, did not constitute a regulation of foreign commerce foreclosed to the President by the Constitution or the Trade Expansion Act. U.S.C.A.Const. art. 1, § 8, cl. 3; Trade Expansion Act of 1962, § 102 et seq., 19 U.S.C.A. § 1801 et seq.

Abe Krash, Washington, D.C., with whom Jerome I. Chapman and David Bonderman, Washington D.C., were on the brief, for appellant in No. 73-1095.

Irwin Goldbloom, Atty. Dept. of Justice, with whom Morton Hollander and David J. Anderson, Attys. Dept. of Justice J. Dapray Muir, Asst. Legal Adviser, Dept. of State, were on the brief for appellants in No. 73-1096.

Lloyd N. Cutler, Washington, D.C., with whom Max O. Truitt, Jr., Daniel K. Mayers and Ronald J. Greene, Washington, D.C., were on the brief, for appellants in No. 73-1097, also argued for all other appellants.

William B. Pennell, New York City, with whom Richard A. Whiting, Monroe Leigh, Daniel J. Plaine and Virginia M. Dondy, Washington, D.C., were on the brief, for appellant in No. 73-1133 also argued for appellants in No. 73-1135 and No. 73-1138.

Steven Brodsky, Washington, D.C., with whom Richard A. Frank, Washington, D.C., was on the brief, for appellant in No. 73-1132 and appellee in Nos. 73-1095, 73-1096, 73-1097, 73-1133, 73-1135, and 73-1138.

Noel Hemmendinger, Washington, D. C., and Isaac Shapiro, New York City, were on the brief for appellants in No. 73-1135.

Milo G. Coerper, Washington, D.C., was on the brief for appellant in No. 73-1138.

Shirley Z. Johnson, Washington, D.C., filed a brief on behalf of Philip A. Hart as amicus curiae urging affirmance.

Before DANAHER, Senior Circuit Judge, and McGOWAN and LEVENTHAL, Circuit Judges.

McGOWAN, Circuit Judge:

These consolidated cross-appeals are directed respectively to two declarations made by the District Court in a suit

challenging efforts by the Executive Branch of the United States Government to bring about reductions in steel imports by means of self-imposed limitations on foreign producers. Arrayed against each other are a complaining consumers organization, on the one side, and, on the other, the State Department, and foreign and domestic steel producers, individually and in association. In the form eventually taken by the litigation in the District Court, we consider that the only question before us is whether the actions of the Executive were a regulation of foreign commerce foreclosed to it generally by Article I, Section 8, Clause 3 of the Constitution, and in particular by the Trade Expansion Act of 1962, 19 U.S.C. § 1801 et seq. To the extent that the District Court declared no such conflict to exist, we affirm its decision.

I

Steel imports into the United States increased more than tenfold over the period 1958-68, with the great bulk of imports coming from Japan and the countries of the European Communities.[1] The effect of this development on the domestic steel industry, which is deemed to be of great importance to the nation's security as well as to its peacetime economy, became a matter of widespread concern. In 1968 bills with substantial backing were introduced in Congress to impose mandatory import quotas on steel.

The Executive Branch regarded the problem created by steel imports as temporary in nature[2] and thus amenable to a short-term solution.[3] It concluded, moreover, that unilaterally imposed mandatory quotas would pose a danger of retaliation under the General Agreement on Trade and Tariffs, prove inflexible and difficult to terminate, and have a seriously adverse impact on the foreign relations of the United States. Import limiting agreements negotiated with other governments were likewise rejected on the State Department's advice that negotiated official restrictions, if achievable, would have political consequences for the foreign governments that would also affect our external affairs adversely. Accordingly, the Executive Branch concluded in 1968 that voluntary import restraint undertakings by foreign producers offered the best hope of alleviating the domestic industry's temporary problems at the least cost to United States foreign, economic and trade policies.

After an initial showing of interest by the foreign producer associations, State Department officials entered into discussions that lasted from June to December, 1968, and resulted in letters being sent to the Secretary in which the Japanese and European producer associations stated their intentions to limit steel shipments to the United States to specified maximum tonnages for each of the years 1969, 1970, and 1971.[4] During

1. The District Court heard the matter on cross-motions for summary judgment, and the facts are not in dispute. This section of the opinion draws mainly upon the affidavit of Julius L. Katz, one of the State Department defendants and Deputy Assistant Secretary of State for International Resources and Food Policy, filed in support of the motion for summary judgment.

2. The bulk of steel import increases were not attributed to the Kennedy Round reductions in tariffs, which would be continuing in nature, because they predated the effective dates of those reductions, and cost and price differentials between foreign and domestic products greatly exceeded the pre-reduction tariffs.

3. Factors believed to cause the import increase, such as excess capacity and a technological advantage in the foreign steel industry, were both regarded as probably short-run phenomena. Whether foreign governments' policies of assisting their steel industries, and lower labor costs abroad, were also thought to be temporary in nature is not clear.

4. The letters to the Secretary, dated December 23, 1968, were approvingly read by President Johnson after their receipt, and were transmitted by the Secretary on January 14, 1969, to the respective Chairmen of the Senate Finance Committee and the House Ways and Means Committee. The recipients thereupon issued a joint announcement welcoming

1970, domestic industry and union representatives urged the State Department to seek renewal of the restraints beyond 1971 to provide greater time within which to achieve needed changes, and the House Ways and Means Committee issued a report to like effect. When various executive organs, such as the President's Council of Economic Advisors, had made the same recommendation, the President directed the Secretary to seek extensions of the limitation representations. Such extensions, covering 1972 through 1974, were forthcoming in letters dated early in May, 1972, and announced by the President on May 6.[5]

The two 1972 letters are substantially alike. Each states the signatories' intention to limit exports of steel products to the United States both in aggregate tonnage and, within such limits, in terms of product mix. Each represents that the signatories "hold themselves [itself] ready to consult with representatives of the United States Government on any problem or question that may arise with respect to this voluntary restraint undertaking" and expect the United States Government so to hold itself ready.[6] In addition, each states that its undertaking is based on the assumptions that (1) the effect will not be to place the signatories at a disadvantage relative to each other, (2) the United States will take no unilateral actions to restrict exports by the signatories to the United States, and (3) the representations do not violate United States or international laws.

II

The original complaint in this action contained two separate and distinct claims. They were respectively denominated "FIRST CLAIM (Antitrust)" and "SECOND CLAIM (Unlawful Action by State Department Officials)". The first claim sought declaratory and injunctive relief with respect to what were said to be continuing violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The court was asked to declare the 1972 letters of intent to be in violation of that statute, and to enjoin all of the named defendants from engaging in any act to effectuate the import reductions contemplated by those letters.

The second claim, as its title implies, sought relief only with respect to the State Department defendants, who were said to have violated the law by "facilitating, bringing about and negotiating" the limitations set forth in the 1972 letters of intent without compliance with Section 301 or Section 352 of the Trade Expansion Act of 1962. The relief sought was a declaration that the 1972 export limitations are illegal, and an injunction addressed to all the defendants, prohibiting acts in furtherance of the arrangement.

After answers had been filed by some of the defendants and a motion to dismiss or alternatively for summary judgment had been made by the State Department defendants, the parties stipulated that the first claim in the complaint be dismissed with prejudice, and an amended complaint was filed. The violation of law alleged in the amended com-

the voluntary restraints and releasing the texts of the producers' and the Secretary's letters. No mandatory import quota legislation was recommended by the committees thereafter.

5. The British steel industry, which had not participated in the 1968 statements of intent, joined in the 1972 letter from the European Communities steel producer associations. It did so through both the British Independent Steel Producers Association and the British Steel Corporation, an enterprise controlled by the British government.

6. It is undisputed that "[i]n negotiating the arrangements and all of their specific terms, the State Department officers explained to the foreign producers that they were being asked to make the requested commitments by the Executive Branch of the United States Government on the ground that they were in the national interest of the United States." JA 155a.

plaint was that the State Department officials had acted to regulate foreign commerce within the meaning of Article 1, Section 8, Clause 3 of the Constitution, and of the laws relating to the regulation of foreign trade set forth in Title 19 of the U.S.Code, including Sections 301 and 352 of the Trade Expansion Act of 1962. The foreign producer defendants were said to be violating the same laws to the extent that they took steps to effectuate the limitations sought by the defendant State Department officials acting in excess of their authority. The relief sought was a declaration that the actions of the State Department officials in seeking the export limitations were *ultra vires*, and an injunction against the defendants from furthering the 1972 letters of intent in any way.

Answers to the amended complaint were filed by certain of the defendants and others moved for summary judgment, as did the plaintiff. The matter came on for hearing in the District Court on the cross-motions for summary judgment. Its disposition was embodied in what is styled a "Memorandum Opinion, Declaration and Order." The court concluded its discussion of the issues by making two declarations. The first was that "the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt." The second was that "the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962."

The court then went on to say that, although the question of whether there was a violation of the Sherman Act was not before it by reason of the stipulated dismissal of the antitrust claim with prejudice, it was apparent to the court that "very serious questions can and should be raised as to the legality of the arrangements under the [Sherman] Act"; and the parties were "urged to reexamine their positions and premises in the light of this memorandum and the declarations made." The court characterized injunctive relief as inappropriate, and denied the respective motions for summary judgment to the extent that they were "inconsistent" with the declarations made by it. It concluded by saying that "no further proceedings are required," and "no costs will be awarded."

Appeals were filed by the State Department defendants and by the domestic and foreign producers. The plaintiff filed a cross-appeal "insofar as any declaration, or ruling on the relief requested, has been decided adversely to the plaintiff."

III

A substantial portion of the briefs and argument before us has been devoted to the Sherman Act. The defendant-appellants are, not surprisingly, perturbed by some of the comments made by the District Court with respect to possible Sherman Act liability. Although the court stated in terms that, by reason of the stipulation of dismissal, "the question of whether or not a violation of the Sherman Act is present is not before the Court to decide," it did not leave the matter at that. One of its declarations is that the Executive has no authority to exempt from the antitrust laws the arrangements here involved, and "that such arrangements are not exempt."

[1] Since there is nothing in the record that shows the Executive as purporting to grant such an exemption,[7] this

7. In a post-argument communication to the District Court, the Department of Justice represented that "no assurances of immunity from the antitrust laws had been given to anyone. It went on to say that "the Executive Branch did not and it would not request any party to enter into any arrangement it believed to be unlawful."

observation by the court does not have the stature of a declaratory disposition of an actual controversy. The court's other comments in this connection are not couched in adjudicatory form, as indeed, so the court recognized, they could not be in the light of the abandonment by the plaintiff of its antitrust claim. With the declaration vacated, as we shall direct in our judgment, these expressions of the court's opinion are without judicial force or effect and are not appropriate for pursuit upon appeal.

We think that the Sherman Act issue, for all practical purposes, disappeared from this case when the plaintiff, for reasons best known to itself, stipulated its dismissal with prejudice. It is apparent from the face of the original complaint that the Sherman Act claim was originally conceived by the plaintiff as a vital aspect of its lawsuit. Its resolution would almost certainly have required the exploration by adversarial trial of a number of complex questions of fact and law, and the making of legal rulings in an area not distinguished for its simplicity. When the plaintiff, confronted by that formidable prospect, elected to abandon its antitrust claim, the Sherman Act could no longer play a significant part in this controversy, and we have no occasion to concern ourselves with the discussions by the parties of the precise reach of that statute.[8]

IV

[2] We turn, then, to the District Court's declaration that, in respect of the actions of the Executive culminating in the undertakings stated in the letters of intent, "the Executive is not preempted . . . and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962." That statute, as its name suggests, had as its principal purpose the stimulation of the economic growth of the United States and the maintenance and enlargement of foreign markets for its products.[9]

This was to be achieved through trade agreements reached by the President with foreign countries. Title II of the Act provided that, for a period of five years (1962-67), the President was authorized to enter into such agreements whenever he determined that any existing tariff duties or other import restrictions of either the United States or any foreign country were unduly burdening and restricting the foreign trade of the United States. Upon reaching any such trade agreement, the President was delegated the unmistakably legislative power to modify or continue existing tariffs or

8. As might be expected in light of the stipulation, the amended complaint nowhere refers expressly to the Sherman Act. Under the caption "VIOLATION OF LAW ALLEGED," it charges that the actions of the State Department defendants constitute a prohibited regulation of foreign commerce "within the meaning of the laws of the United States relating to the regulation of foreign trade as set forth in Title 19 of the United States Code, including Sections 301 and 352 of the Trade Expansion Act of 1962, 19 U.S.C. Sections 1901, 1982." Having asserted these actions to be unlawful for this reason, the complaint does go on to say that the State Department defendants, by securing the limitation arrangements in a manner not authorized by Congress (*i. e.*, by not using the provisions of Title 19), acted in conflict with the power of Congress "to determine the antitrust policy of the United States by enacting the antitrust laws and to determine the circumstances under which exceptions to those laws shall be permitted." To the extent that this seems to say that there was an antitrust violation because the State Department officials did not employ the provisions of Title 19, the point fails in the light of our holding hereinafter that the Executive did not engage in conduct implicating those provisions.

We note that the third and last paragraph under this caption in the amended complaint alleges that the foreign defendants acted in violation only of provisions of Title 19, which, of course, does not contain the Sherman Act. The domestic steel producers, in our reading of the amended complaint, are not alleged to have acted in violation of any law.

9. The other stated purposes were "to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world"; and "to prevent Communist economic penetration." 19 U.S.C. § 1801.

other import restrictions, to continue existing duty-free or excise treatment, or to impose additional import restrictions, as he determined to be necessary or appropriate to the carrying out of the agreement. 19 U.S.C. § 1821. In connection with the first two of these powers, the Tariff Commission was given an advisory function, which included public hearings; and public hearings were also directed to be held, by an agency designated by the President, in connection with any proposed trade agreement. 19 U.S.C. §§ 1841, 1843.

Title III of the Trade Expansion Act of 1962, recognizing that domestic interests of various kinds may be adversely affected by concessions granted under trade agreements, authorizes the making of compensating adjustments of various kinds. Section 301 (19 U.S.C. § 1901) provides that the Tariff Commission shall undertake investigations of injuries allegedly being done to domestic businesses or workers by such things as increased imports flowing from a trade agreement. After holding public hearings, the Tariff Commission shall make a report to the President. If it affirmatively finds injury to domestic industry, the President may under Section 351 increase or impose tariff duties or other import restrictions, 19 U.S.C. § 1981, or alternatively he may under Section 352 negotiate agreements with foreign governments limiting the export from such countries to the United States of the article causing the injury. 19 U.S.C. § 1981. If this latter option is taken, the Act provides that the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by the agreement.

The foregoing description of the Trade Expansion Act of 1962 covers, among others, Sections 301 and 352. They are the only provisions expressly identified in the amended complaint as constituting the allegedly preemptive exercise by Congress of its constitutional power to regulate foreign commerce that, so it is said, forecloses the actions of the Executive challenged in this case. The description extends also to Sections 302 and 351, which are referred to in plaintiff-appellant Consumers Union's brief, as is also Section 232, 19 U.S.C. § 1862. This last is the so-called national security clause which provides that the President shall not decrease or eliminate tariffs or other import restrictions if to do so would impair the national security. The Director of the Office of Emergency Planning is directed to investigate any situation where imports threaten to impair the national security; and if he finds such threat, and the President concurs, action shall be taken "to adjust the imports" of the article in question, which means that the article may by regulation be excluded from entry or withdrawal from warehouse.[10]

[3] What is clear from the foregoing is a purpose on the part of Congress to delegate legislative power to the President for use by him in certain defined circumstances and in furtherance of certain stated purposes. Without such a delegation, the President could not increase or decrease tariffs, issue commands to the customs service to refuse or delay entry of goods into the country, or impose mandatory import quotas.[11]

10. The Katz affidavit asserts that consideration was given to the utilization of both Section 352 and Section 232. The former "could not seriously be considered" because it was in terms made available by Congress only for the purpose of softening injuries to domestic commerce caused in major part by prior concessions in trade agreements; and this was not a major cause in this instance. As to Section 232, national security was only one of the factors contributing to the problem, and the attempt to solve it by a method which armed the President with legislative power to stop foreign imports at the water's edge would have had an unfortunate impact on foreign trade policy and international relationships.

11. The United States Customs Court has quite recently invalidated the imposition by Presidential proclamation of a 10% supplemental tariff increase on imported merchandise. Yoshida International, Inc. v. United States, 378 F.Supp. 1155 (Cust.Ct.1974). This action was held by the court to be an exercise of leg-

To make use of such delegated power, the President would of course be required to proceed strictly in accordance with the procedures specified in the statutes conferring the delegation. Where, as here, he does not pretend to the possession of such power, no such conformity is required.

[4] The steel import restraints do not purport to be enforceable, either as contracts or as governmental actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by the foreign producers of their self-denying representations. They are a statement of intent on the part of the foreign producer associations. The signatories' expectations, not unreasonably in light of the reception given their undertakings by the Executive, are that the Executive will consult with them over mutual concerns about the steel import situation, and that it will not have sudden recourse to the unilateral steps available to it under the Trade Expansion Act to impose legal restrictions on importation. The President is not bound in any way to refrain from taking such steps if he later deems them to be in the national interest, or if consultation proves unavailing to meet unforeseen difficulties; and certainly the Congress is not inhibited from enacting any legislation it desires to regulate by law the importation of steel.

The formality and specificity with which the undertakings are expressed does not alter their essentially precatory nature insofar as the Executive Branch is concerned. In effect the President has said that he will not initiate steps to limit steel imports by law if the volume of such imports remains within tolerable bounds. Communicating, through the Secretary of State, what levels he considers tolerable merely enables the foreign producers to conform their actions accordingly, and to avoid the risk of guessing at what is acceptable. Regardless of whether the producers run afoul of the antitrust laws in the manner of their response, nothing in the process leading up to the voluntary undertakings or the process of consultation under them differentiates what the Executive has done here from what all Presidents, and to a lesser extent all high executive officers, do when they admonish an industry with the express or implicit warning that action, within either their existing powers or enlarged powers to be sought, will be taken if a desired course is not followed voluntarily.

The question of congressional preemption is simply not pertinent to executive action of this sort. Congress acts by making laws binding, if valid, on their objects and the President, whose duty it is faithfully to execute the laws. From the comprehensive pattern of its legislation regulating trade and governing the circumstances under and procedures by which the President is authorized to act to limit imports, it appears quite likely that Congress has by statute occupied the field of *enforceable* import restrictions, if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution. There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce—regulation enforced ultimately by halting violative importations at the border—and assurances of voluntary restraint given to the Executive. Nor is there any warrant for creating such a conflict by straining to endow the voluntary undertakings with legally binding effect, contrary to the manifest understanding of all concerned and, indeed, to the manner in which

islative power by the Executive in the regulation of foreign commerce, for which no delegated authority could be discerned in the statutes relating to tariffs. We mention the case not with reference to the rightness or wrongness of the decision but only because of the contrast between the action taken by the Executive in that case, *i. e.*, goods from abroad were excluded by force of asserted law unless the supplemental duties were paid, with what was done here, *i. e.*, no legal power to exclude foreign steel imports was either claimed or exercised by the Executive.

departures from them have been treated.[12]

In holding, as we do, that the District Court did not err in declining to characterize the conduct of the Executive here under attack as in conflict with the Trade Expansion Act of 1962, we are not to be understood as intimating any views as to the relationship of the Sherman Act to the events in issue here. The Sherman Act is not, as noted above, one of the regulatory statutes charged as preempting the field, and the question of its possible substantive applicability vanished from this case with the original complaint.

The declaration in the District Court's order with respect to antitrust exemption is vacated, and the declaratory aspect of that order is confined to the proposition that the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S.Code. As so confined, the order appealed from is affirmed.

It is so ordered.

DANAHER, Senior Circuit Judge (concurring):

Assuredly I join in Judge McGowan's excellent opinion. Pragmatic in the sense that it represents the view of a jurist skilled in law and state affairs, Judge McGowan's treatment does not ignore the background of the problem here posed nor does it fail to take account of the allegations of Consumers' amended complaint with its appended exhibits and the agreed statement of facts submitted in the District Court. I feel impelled to voice additional comment only in view of the approach offered in dissent by our respected colleague.

At the outset, Judge Leventhal correctly has stated that this case "must be decided as if the complaint had never contained a claim under the antitrust laws". The original complaint had indeed set up a purported antitrust predicate, but Consumers on the record caused that count to be dismissed "with prejudice".

Next, even were we to assume that the District Court had jurisdiction under the Federal Declaratory Judgments Act, it was "under no compulsion to exercise that jurisdiction", Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 62 S.Ct. 1173, 1175, 86 L.Ed.2d 1620 (1942), citing Aetna Casualty Co. v. Quarles, 92 F.2d 321 (4 C.A. 1937) with Judge Parker's discussion at 325 which here we might profitably recall. For present purposes, we may pass that point for even though the antitrust claim had been dismissed, the District Judge declared that "the Executive is not preempted and may enter into agreements or diplomatic arrangements with *private foreign steel concerns* . . .". Consumers Union of U. S., Inc. v. Rogers, 352 F.Supp. 1319, 1323 (DDC1973). (Emphasis added.) The District Judge explained that the Acts, such as those cited in the dissent, "cannot be read as a congressional direction to the President prohibiting him from negotiating in any manner with private foreign companies as to commercial matters". *Id.*

So we turn to the area urged in the dissent in rejection of the District Court's declaration and in the assertion that congressional authority is "plenary". We may join issue here.

I.

Our dissenting colleague regards the arrangements with the foreign private concerns as "solemn negotiated bilateral understandings". The record shows that the private producers themselves limited their own exports. Our colleague sees the Executive in position to call upon nonjudicial exercises of power if the foreign producers violate the arrangements. He suggests, e. g., that there

12. In 1969 the Japanese, and in 1972 all foreign producers, exported to the United States more steel or particular types of steel product than their undertakings contemplated. In no case were the "excess" goods denied entry into the United States. Rather, consultations were sought and the next year's voluntary quota reduced by the amount of the excess.

could be "possibly a call to reduce assistance programs" to the *country* of a foreign producer. He ventures "Suppose the President directed customs officials to deny entry to United States ports of commodities violating the undertaking." None of these things happened.

Rather, the record shows, that during the years 1957 through 1968 there developed an unprecedented increase in steel imports, particularly from producers in Japan and European countries. Import tonnages of steel mill products in 1957 totaled 1,155,000 net tons which by 1968 had become 17,960,000 net tons. Bills were introduced in Congress directed toward the imposition of restraints and controls of steel imports, with the result that worriment overtook our own officials as well as representatives of foreign producers. A Japanese economic mission sent its chairman in March 1968 to discuss problems of the steel trade with the particular objective of avoidance of congressionally imposed limitations upon the entry of Japanese steel.

It is not to be doubted that importantly placed officials in our Executive departments were fully aware of our tariff laws and regulations and of the legislative restrictions upon Presidential action.

By May 1968 Department of State officials and European steel industry representatives had joined in discussions which went forward through June and July 1968. Perhaps it is not too much to "suppose" (our colleague's word) that President Johnson said "Why don't you get those people in here and see if you can reason together with them?"—or words to that effect.

Before the undertakings by and among the foreign steel producing companies were activated, the Department of State sought and obtained the views of members of Congress, representatives of domestic steel producing interests, unions involved in the steel industry and others.

II.

So successful were the original three-year programs, so happily without incident, that an extension for an additional three years went forward only to be challenged in this action.

In this great nation with its complex economy and its varying conflicts requiring judicious accommodation, flexibility in achieving desirable results is a constant imperative. Fairly we may say that here there had been no Presidential action, legislative in character, undercutting the congressional prerogatives deemed by the dissent to be "plenary". If it be a penchant of our press to coin applicable expressions, "jawboning" could here be taken as apt and that is what happened, nothing else.[1]

Collaterally and obviously not here controlling, we might well today applaud exhortations by our officials to companies producing oil in the Middle East to reduce their charges and to increase their exports of oil to our power starved economy. We might take it to be desirable that coffee producing companies in nations such as Brazil and Colombia be induced by our officials not to exploit our dependence upon their product by the imposition of unreasonable and exorbitant charges for their coffee exports. Surely no formal trade agreement should be required to persuade companies to export to us the bauxite so essential to the continued maintenance of our aluminum industry.

Judge McGowan, it is submitted, succinctly and authoritatively has concluded that "the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S.Code".

1. *Cf.* United States v. Guy W. Capps, Inc., 348 U.S. 296, at 297, 75 S.Ct. 326, 99 L.Ed. 329 (1955) refusing to pass upon the ruling by the court of appeals (204 F.2d at 658) that an international agreement to limit Canadian exports was void "as not authorized by Congress and as contravening the provision for procedure through the Tariff Commission", *id.* 348 U.S. at 301, 75 S.Ct. at 329. *See* Appendix, *id.* at 305, 75 S.Ct. 326.

LEVENTHAL, Circuit Judge (dissenting):

With all respect, I must record my disagreement with the ruling of the majority that the President had the authority to negotiate detailed arrangements with foreign steel producers to limit their shipments of products to the United States.

In my view, this case is controlled by Congress's exercise of its plenary authority over the regulation of foreign commerce through passage, over the past forty years, of legislation establishing a comprehensive scheme occupying the field of import restraints. While there is room for a role based on inherent authority of the executive, in this case the actions taken by the President are inconsistent, by fair implication, with the scheme Congress has provided. My point is not that the President has taken the kind of action that Congress had forbidden to the Executive. On the contrary, the statutes passed by Congress established a broad executive discretion, and with a subject like steel imports and the kind of expansive scope of the "national security" provision (which emerged in the 1950's and now appears in § 232 of the Trade Expansion Act of 1962) that permits a restriction of imports which threaten to impair the national security by weakening the internal economy, there is a likelihood that the President would have been able to make the findings required by that law. But Congress has made the exercise of executive authority over import restraints dependent on public ventilation of the issues and has prescribed a procedure with safeguards and right of comment by affected interests. The President has concededly not followed that procedure, and this course cannot stand consistently with the statutory pattern.

Recent events, notably those affecting currency exchange rates and prices and supplies of fuels, have dramatically changed the economic climate that sparked these trade arrangements. While the particular issue may be less pressing, there has been no dilution of the principle that the Executive cannot circumvent procedures delineated by Congress. That principle is paramount even though it may sometimes lead judges to particular results that are dubious pragmatically. *Compare* Wilderness Society v. Morton, 156 U.S.App.D.C. 121, 479 F.2d 842 (1973); Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972).

I am not persuaded by the majority's pronouncement that the statutes are not pertinent to the present case because the arrangements, incorporated in letters from foreign steel producers which describe themselves as "voluntary restraint undertakings," did not contemplate the mandate of judicial enforceability. These undertakings by the President and foreign steel producers were carefully structured in considerable detail, obviously after detailed consultation with American steel interests, without exposure to the kind of input by purchasers that would have been provided if the Congressional procedures had been followed. These undertakings are bilateral, and establish obligations. Their bite persists notwithstanding the majority's effort to coat them bland vanilla. The majority tolerates executive detours around the limits staked by Congress in the field it has occupied. Its concept that a different route is available for executive arrangements discerned as not intended for judicial enforcement is, in my view, unsound.

I. THE 1972 LETTERS

The subject of this litigation is, specifically, the arrangements made in 1972 between the Executive and foreign steel producers. In early 1970, various steel industry and labor union representatives, still concerned about the effect of dramatically increased steel imports on domestic industry, urged the State Department to seek an extension of commitments that had been made for the years 1968 to 1971. Following a study by a special committee, the President, in December 1970, directed the Department of State to seek new pledges from the foreign

producers. The State Department, according to the affidavit of a cognizant official, "met with various domestic interests," and "received information and advice from diverse elements of the steel industry." The affidavit goes on to say: "The arrangements 'were entirely the result of negotiations between the foreign producer representatives and State Department officials who . . . spoke for and represented the policy judgments of the United States Government alone." [1]

The 1972 arrangements were embodied in separate letters to the Secretary of State—from the Japan Iron and Steel Exporters' Association, and from the steel producers of the European Economic Community, including the United Kingdom. The letters were released by the White House on May 6, 1972, along with a Statement by the President and a Fact Sheet. President Nixon characterized this "welcome development" as the product of more than a year's effort by Deputy Under Secretary of State for Economic Affairs Nathaniel Samuels. The President's Statement announced that under the 1972 arrangements the foreign steel producers "pledge a three-year restraint" on steel exports to the United States, and further stated that this undertaking "represents a substantial improvement" over prior arrangements.

The arrangements set limitations on total amounts of steel mill products to be shipped to the United States in 1972—6.498 million short tons from Japan, and 8,013,754 short tons from the United Kingdom and European Community; and a limit of 2.5% of growth increase in each of the following two years. There were also more specific and detailed arrangements, summarized as follows in the White House Fact Sheet:

> "The provisions of the renewed undertakings also include a firmer understanding on product mix and geographic distribution, with specific tonnage limitations on each of the three categories of specialty steel—stainless, tool and other alloys."

Thus the limit on shipments of stainless steel mill products in 1972 was set at 16,873 metric tons for the steel producers of U.K. and EEC, and at 72,463 metric tons for the steel producers of Japan.

Each of the letters contained a paragraph on "Consultations"—which recorded the understanding that the producer associations "hold themselves ready to consult with representatives of the United States Government . . . [and] expect that, similarly, the United States Government would be prepared to consult with their representatives on any problem or question that may arise with respect to this voluntary restraint undertaking." [2]

1. Affidavit dated August 25, 1972, of Julius L. Katz, Deputy Assistant Secretary of State for International Resources and Food Policy, Bureau of Economic Affairs, paragraph 14.

2. Paragraph 5 of the May 2, 1972, letter of the associations of the steel producers of the U.K. and the EEC, provides:

> Consultations—The above-mentioned producer associations, through their authorized representatives, hold themselves ready to consult with representatives of the United States Government on any problem or question that may arise with respect to this voluntary restraint undertaking. They expect that, similarly, the United States Government would be prepared to consult with their representatives on any problem or question that may arise with respect to this voluntary restraint undertaking. They reserve the right to request consultation in the event that they consider they have been placed in a disadvantageous position with respect to other exporters of steel to the United States by developments in the international steel market taking place subsequent to entering this undertaking, or if developments in the international steel market should take place which could substantially impair the carrying out of this undertaking. Similarly, they recognize that the United States Government may request consultation if it considers that developments in the international steel market have taken place during the term of this undertaking which substantially affect any of the provisions of this arrangement.
>
> The above-mentioned producer associations reserve the right to request consultation with respect to the exclusion in particular

Each letter stated that its "voluntary restraint undertaking is based upon the following assumptions"—(a) that the disadvantages imposed by the arrangements should be equalized for importing producers, (b) that the United States Government will take no unilateral action to restrict the quantity of steel imports, or to raise tariffs, or to impose supplemental duties on import of steel, and (c) that the undertaking is not in violation of "any law of the United States or international rule."

It is undisputed that the President, in negotiating these steel import limitations, did not act pursuant to any authority delegated by Congress. The State Department affidavit tendered by the defendants sets forth that Executive action under existing statutory authority was pondered and rejected.[3] Presidential imposition of import quotas is authorized under the "escape clause" provisions of Title III of the Trade Expansion Act of 1962, 19 U.S.C. § 1901, but only on a finding of injury caused in major part by "concessions" granted under trade agreements; and the difficulties of the domestic steel industry were ascribed to excess capacity, superior technology, and a cheaper supply of labor available to foreign producers, rather than to concessions.

Under § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, the President has authority to limit imports to protect the national security, but this authority was also eschewed, for the reason that national security was only one of several factors pointing toward import restrictions.

II. THESE ARRANGEMENTS ARE IN SUBSTANCE INTERNATIONAL AGREEMENTS NEGOTIATED BY THE PRESIDENT THAT EMBODY OBLIGATIONS AND MUST COMPLY WITH THE PROCEDURAL SAFEGUARDS PRESCRIBED BY CONGRESS AS A CONDITION OF EXECUTIVE RESTRAINTS ON IMPORTS

The contention, accepted by the majority, that the President's action is valid, notwithstanding its lack of statutory authorization, is based on two propositions: (1) the action is within the President's independent "foreign affairs" power; and (2) the import restraint achieved as a result of the President's action is not pre-empted by the Congressional regulatory structure.

Though there is no specific Constitutional clause granting the President power to conduct foreign affairs, that power has long been recognized. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed.2d 255 (1936). The President's role in shaping foreign policy is rooted in and enhanced by his ability to communicate with foreign governments in the conduct of diplomacy. *See* L. Henkin, Foreign Affairs and the Constitution 47 (1972). Presumably, diplomacy ordinarily comprehends negotiation with officials of foreign governments, rather than direct negotiations with foreign firms as here, but I hesitate to suggest that this constitutes an absolute limitation on the President's authority. What has been called the "foreign relations 'apparatus,'" Henkin, *supra*, at 46, gathers a variety of commercial information in foreign countries, and this function inevitably involves contact with foreign firms, whether or not their governments are a conduit for communication.

However, to say that executive communications with a foreign national are within the President's foreign affairs role only opens the door to analysis. Here the purpose of the communication was to manage commerce between the

situations from the export limitation quantity in paragraph 1 above of shipments of large-diameter line pipe.

The May 4, 1972 letter of the Japanese steel producers contains a virtually identical paragraph.

3. Affidavit of Mr. Katz, ¶ 7, JA 115a-117a, referring to 1968 consideration "by senior officials of the responsible agencies of the Government."

United States and the foreign producers involved—a matter over which Congress has plenary power conferred by Article I, § 8. While it would be too narrow a view of the executive function to say that foreign commercial relations are not a proper subject of executive communications with foreign entities, the executive cannot, through its communications, manage foreign commerce in a manner lying outside a comprehensive, regulatory scheme Congress has enacted pursuant to its Article I, § 8 power. As Mr. Justice Jackson said in speaking of shared Congressional and executive powers:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, 637, 72 S.Ct. 863, 871, 96 L.Ed. 1153 (1952) (concurring opinion).

The proper inquiry, then, is whether the executive action in obtaining the agreements for steel import restrictions comports with the Congressional program for foreign trade, or whether Congress, by occupation of the field of foreign import restraints, has precluded the President's taking action on an independent basis without complying with the standards and procedures provided by Congress as a condition of executive effectuation of import restraints.

The majority says that the steel import restraints are in harmony with the statutory program because they are not enforceable in courts of law; they are said to be mere precatory expressions which Congress never intended to circumscribe by the procedural requirements applicable to mandatory import controls.

This response presents an issue that focuses on the nature and effect of the undertakings before us. Turning first to effect, Presidents may engage in many activities that have a perceivable economic impact upon the volume of commodities imported. The effects vary in terms of their stability, their specificity, and their duration. At one pole would lie general Presidential exhortations—say, to consumers to "Buy American"—or general alarms, announcing that protective legislation will be sought if imports are not contained. Such appeals are valid even though they may have the effect of inhibiting some market behavior, and no one would view them as prohibited by even the strongest Congressional "free trade" legislation. At the other extreme is a Presidential proclamation that foreign-trade commodities will not be allowed to enter, which plainly cannot be reconciled with the existing statutory structure, or legitimated by reference to some aura of "inherent" Presidential authority. In between is a continuum of restrictions. In my view, the comprehensive statutory program constrains some but not all of the activities in this continuum. Here, the undertakings have an economic effect that parallels that of import quotas proclaimed by the President.

Turning to its nature, the Presidential action here goes far beyond a speech or announcement—even one preceded by "feelers" to foreign governments to ascertain how much they will tolerate. Far from being mere expressions of desire and intent, these are solemn negotiated bilateral understandings.

The arrangements are not unilateral announcements but the culmination of bilateral discussions that were not only participated in, but initiated by State Department officials. Although the final letters that embody the specific limitations are astutely couched in a litany of a "voluntary restraint undertaking" on the part of the foreign steel producers, the circumstances are instinct with bilateral undertaking.

Obviously, foreign firms that have vigorously marketed their products in the United States do not voluntarily withhold production without some reciprocal aspect indicating that forbearance

is to their advantage. Here, the undertakings of the foreign producers rest on Government assurances that disadvantages would be equalized among producers; that the United States Government—or at least the not uninfluential Executive Branch—would not take or start other measures to limit steel imports or increase duties; and that the transaction would not violate any law of the United States.[4]

The specificity of the limitations imposed by the undertakings[5] also indicates that they were the result of bilateral bargaining and agreement.

Significantly, by the terms of the arrangements, the parties contemplate continuing consultations. The foreign steel producers "hold themselves ready to consult" on any question that may arise on the interpretation of their "undertaking." Does one accompany a unilateral declaration of intent with an offer to "consult" about what he has declared? When the foreign producers go on to say that their undertakings are based on their expectation that the United States Government will consult with them on questions that arise, and the White House releases these letters, along with a detailed Fact Sheet, as a "welcome development" that is the product of Executive negotiation can it be meaningfully denied that there is a reciprocal undertaking by the United States Government to engage in consultations with the producers?

The inference of bilateral undertaking is strengthened when the arrangement is placed in the context of historical practice. Export forbearance by foreign producers has historically been obtained by diplomatic exchange of notes between the United States and foreign governments. The diplomatic notes themselves have referred to an "agreement" or "gentlemen's agreement" to limit shipments.[6]

International agreements are not limited to those embodied in formal documents, authenticated with ceremony, but include, as here, the specifying of an arrangement, together with mutual assurances and understandings as to how all parties will behave in response. To cast the steel restraints as unilateral undertakings rather than as agreements is to exalt form over substance.

The majority asserts that, unlike agreements negotiated pursuant to statute, which may be enforced by executive regulations and ultimately by judicial sanctions, the steel arrangements are unenforceable. But it is by no means clear that the Executive is without sanctions if the producers fail to abide by the arrangements. The very specificity of the limitations described by the letters makes violations easy to detect and the arrangements easy to enforce. That the threat of sanctions may carry considerable weight is indicated by the cooperation of the Japanese producers in making compensatory adjustments when they exceeded the quota for 1969 established by the original agreement. The remedy was a reduction of the 1970 quota by the amount of the overshipment. *See* Fifteenth Annual Report of the President of the United States on the Trade Agreements Program 28 (1970). Similarly, when the Japanese producers exceeded their aggregate quotas for 1972, "consultations" resulted in an agreement by the Japanese producers to charge the 1972 overshipments against 1973 quotas. *See* Seventeenth Annual Report of the President of the United States on the Trade Agreements Program 44 (1972).

If, as the Government argues, the President has inherent power to negotiate these and similar restraints, I fail to see why the courts would or should refrain from enforcement if sought. Products shipped to the United States in excess of the restraints might be denied

4. Letters of the European Economic Community and United Kingdom associations of steel producers and of the Japan Iron and Steel Exporters' Association, ¶ 6, JA 131a and 137a.

5. *See* pp. 146–148 *supra*.

6. *See* the 1935 limitation on imports of Japanese cotton goods and the 1936 limitation on imports of Japanese cotton rugs, both described in the Appendix, *infra*.

entry, or domestic firms might be enjoined from handling them.

The common law of international agreements respects voluntary undertakings even in the absence of the "consideration" that is required under historic Anglo-American common law for domestic agreements to be enforceable in most state courts. If there must be a diplomatic peppercorn, there is consideration in the fact that the undertakings by the producers were plainly not meant to be revocable at will, and were based on a United States Government undertaking for consultation in the event problems arose and for avoidance of unilateral action against imports and tariffs. As I earlier indicated, this undertaking was binding on the Government which released and thus acknowledged this aspect of the letter arrangements. Further, principles of promissory estoppel may bind the foreign parties, even in the absence of a finding of initial consideration, once the Executive has relied on their representation that they intend to abandon any right they may have had to exceed the stated limitations on imports—as it has relied here by failing to take other steps to limit imports. *See* Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (1879); Casey v. Galli, 94 U.S. 673, 680, 24 L.Ed. 168 (1876); Goodman v. Dicker, 83 U.S.App.D.C. 353, 354, 169 F.2d 684, 685 (1948).

Even if judicial enforcement was not contemplated by the parties, the arrangements still embody a restraint. Trade agreements between foreign nations, and indeed many international agreements, may be "enforceable" only in the sense that they depend for enforcement on "good faith" performance by the parties. That does not make them any the less solemn agreements, that are both intended to affect the conduct of the parties and likely to have that result.

Moreover, the Executive may call on non-judicial resources if foreign producers violate the arrangements. Actions that would ordinarily be resisted as inconsistent with amicable relations, possibly a call to reduce assistance programs to the country in question, could hardly be assailed in the face of foreign producer bad faith.

A deliberate breach may well have an outcome intermediate between direct judicial enforcement and complete non-involvement on the part of the judiciary. Suppose the President directed customs officials to deny entry to United States ports of commodities violating the undertaking, and suppose such actions were sought to be enjoined. It seems to me entirely likely that the parties might have contemplated both this executive action, and the judicial consequence—on the assumption that the negotiations were valid—that the courts had no basis for holding the executive action invalid.[7]

What is the significance of the reiteration that these undertakings were "voluntary" on the part of the foreign producers? It is commonplace for a businessman to decide "voluntarily" that he will enter into an agreement, although the agreement, once entered into, has binding effect. The mandate may issue from a court of law or arbitration. But the obligations enforced in a court of commercial good faith and good will are as rigorous and insistent as a black-robed judgment. Congress has expressly authorized negotiated limitations in the orderly marketing agreement provision, § 352 of the Trade Expansion Act of 1962.[8] And the national security provision authorizes restrictions imposed by Presidential proclamation, which embraces the authority to arrange restraints to which foreign producers consent.[9]

In my view, the steel quotas before us present an import restraint having a composite characteristic, in terms of ef-

7. This assumes the court would pass on the merits. A court might well dismiss an action on another ground, like lack of clean hands.

8. *See* p. 155 *infra*.

9. *See* pp. 155–156 *infra*.

fect and nature, as to be subject to the procedures and requirements set forth in the Trade Expansion Act of 1962.

This is the critical question in the case—where to draw the line. There is a continuum of restraints, as noted above. In my view, the critical distinction is between executive actions that rest wholly in the domain of appeals and exhortations, and executive actions that culminate in obligations. A good faith agreement with the kind of specificity present here puts an obligation on the foreign producer, in any realistic assessment. Accordingly, I think the executive negotiation and acceptance of these undertakings are activity in a field that has been preempted by Congress, and can only be engaged in by following the procedures set forth in the Congressional enactments.

There is only local color, no legal significance, in the fact that in this case the Chairmen of key House and Senate Committees concerned with regulation of international trade voiced their approval on the occasion of the White House announcement of the undertakings. The Government does not contend, and I do not see how it could rightfully contend, that such participation by particular Congressmen can invest the President with executive authority not otherwise possessed, or constitute a legally decisive definition of the demarcation between the zone that belongs to Congress as a whole and that which belong solely to the President.

I am unimpressed with defendants' citation of statements from the legislative history of various trade provisions [10] as indicating a legislative intent that agreements could be reached without prescribed procedures.

If the entire legislative history is appraised, weight must be given to the two occasions—in the passage of the 1962 law, and again in 1971—when Congress has declined to give the President authorization to impose import restraints without observing procedural requirements.[11] However, the legislative his-

10. Defendants cite a statement in the conference report accompanying the first national security provision that "it is the understanding of all the conferees, both House and Senate, that it is not intended to, and does not, diminish or impair any authority the President *may have* under any other law." H.R. Report No. 745, 84th Cong., 1st Sess. 6 (1955) (emphasis added).

The Conference Report, however, continues:

> For example, it was emphasized that if the President sees fit to stockpile critical materials under any other law that action may be taken wholly aside from the authority contained in this amendment.

The circumspection of Congress, in avoiding any possible contention that it intended to limit other authority of the President, like the stockpiling of critical materials, cannot fairly be stretched into an acquiescence in an inherent general authority to limit imports.

The same approach undercuts defendants' reliance on a statement in the House Report accompanying the Trade Agreements Extension Act of 1958, in which the national security provision was reenacted with modification: "... the President may also take any action available to him under any of his other powers." H.R.Rep.No.1761, 85th Cong., 2d Sess. 14 (1958). The entire sentence in the House Report reads:

> In *emergencies* and for such time as necessary, the President may also take any action available to him under any of his other powers. (Emphasis added.)

Defendants have never attempted to characterize the executive action taken here a response to an emergency. The foregoing language seems irrelevant to the problems before us.

11. In 1962 the Senate approved a bill with a broad authority in the President to limit imports, in this provision (denominated as § 253):

> Notwithstanding any other provision of law, the President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States—
>
> • • • • •
>
> (3) the imposition of such other import restrictions as he finds necessary. H.R. 11970, 87th Cong., 2d Sess. (1962).

This provision did not survive in the Trade Expansion Act of 1962 because it was deleted in Conference. *See* H.R.Rep.No.2518, 87th Cong., 2d Sess. 13 (1962).

The other proposal to enlarge Presidential authority to restrict imports emerged during consideration of the Revenue Act of 1971. New quota authority was proposed by the

tory, as conventionally ascertained, does not give an independent view of Congressional intent, and this must be discerned from basic analysis of the statutes passed by Congress. The deep-seated and comprehensive Congressional insistence on procedural safeguards can best be appreciated in the light of pertinent history.

III. COMPREHENSIVE ENACTMENTS OCCUPYING THE FIELD OF PRESIDENTIAL ACTIONS RESULTING IN OBLIGATORY IMPORTS RESTRAINTS

The ascertainment of pertinent legislative intent depends not only on express wording of the Trade Expansion Act of 1962, and specific notations in its immediate legislative history, but on its character as a culmination of comprehensive enactments on the subject of executive actions resulting in obligatory foreign trade restraints, including agreements by the executive regarding imports. The Congressional pattern makes clear that such executive action is tolerated only if it is accompanied and safeguarded by procedural protections that ensure a right of comment by those whose interests may be affected. This not only avoids the vice of complete secrecy within the Government, it also avoids the vice of cozy confidentiality, in which the public is informed only when the matter is a fait accompli.

1. *General legislation on tariffs and trade agreements*

A. The Tariff Act of 1930, 46 Stat. 590, enacted a comprehensive schedule of duties. It gave the President the power to adjust duties to equalize differences in costs of production between domestic and foreign firms—but only after a Tariff Commission investigation and recommendation.[12] This indicates the Congressional practice of regarding the regulation of trade as its own province. Certain authority was passed to the President, but this was limited both in scope and procedurally. Certain factual findings must be made by an independent body before the Executive can act, even when its goal is the protection of domestic industry.

B. The 1934 amendments to the Tariff Act of 1930, 48 Stat. 943, delegated to the President a then-unprecedented authority to reduce tariff barriers through trade agreements with foreign governments "whenever he finds as a fact that any existing duties or import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States." This authority was renewed some nine times and then set forth in the Trade Expansion Act of 1962.[13] It represents Congress's understanding that the Executive's power in regard to the negotiation of trade agreements derives from statutory authorization by Congress.

In drafting the 1962 Act Congress undertook a comprehensive review of the international trade program. Section 201(a)[14] authorized the President to enter into trade agreements with foreign countries and gave him not only the power to adjust tariffs, within the limits established by § 201(b), but also the power to modify existing or impose additional non-tariff import restrictions, including quotas.[15] However, before entering into negotiations the President was required to publish a list of commodities which would be the subject of the proposed agreement.[16] On the basis of this list, the Tariff Commission was to conduct an investigation, including the holding of public hearings, and to

Senate to meet balance-of-payments emergencies, which were defined with a breadth sufficient to justify the present quotas. Again, however, the proposal was rejected during House-Senate Conference. H.R.Rep.No.708, 92d Cong., 1st Sess. 54 (1971).

12. Section 336, 46 Stat. at 701.

13. 19 U.S.C. § 1821(a).

14. 19 U.S.C. § 1821(a).

15. *See* S.Rep.No.2059, 87th Cong., 2d Sess. 7 (1962); H.R.Rep.No.1818, 87th Cong., 2d Sess. 2 (1962).

16. 19 U.S.C. § 1841.

advise the President of the "probable economic effect of modifications." [17] The President was also to seek advice from other executive departments.[18] Finally, the President was obliged to "afford an opportunity for any interested person to present his views" by designating, if necessary, an additional agency or an intra-agency committee to hold public hearings.[19]

The President's general authority to enter into new trade agreements under § 201 of the Trade Expansion Act expired in July, 1967, and has not been renewed. What has survived is the statute's pattern, that is, a legislative recognition of the need for specified regulatory capability in the President, coupled with procedural requirements of investigations and hearings.

2. *Specific import restrictions*

Congress has itself established specific restrictions on the import of certain commodities.[20]

It has also delegated to the President discretionary authority to impose import restrictions on agricultural commodities [21]—but only after notification by the Secretary of Agriculture that articles are being or are practically certain of being imported in such quantities as to "render ineffective, or materially interfere with" agricultural price support programs, and only after a Tariff Commission investigation that includes hearings.

Section 204 of the Agricultural Act of 1956, 7 U.S.C. § 1854, authorizes the President to negotiate agreements restricting the import of agricultural goods and textiles. Unlike prior authorizations of Presidential action, this section requires no procedures to be followed in its exercise. However, this feature, of lack of required procedures, is a signal departure from the pattern of trade legislation, as has been remarked by members of Congress and commentators,[22] and is limited to certain commodities.

3. *General import restrictions*

Congress has passed not only legislation for specific commodities, but also general provisions available to the President in accomplishing restrictions on the import of any commodity. These provisions, however, retain procedural safeguards to ensure against Executive finalization of restraints in secrecy.

a. *By proclamation under the escape clause.*

Without reviewing in detail the origin of the escape clause in the 1934 legislation and the provision of requisite procedures in § 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 72, it is instructive to examine the structure of § 301 of the Trade Expansion Act of 1962, 19 U.S.C. § 1901, which is the current embodiment of this clause. Section 301(b) provides that the Tariff Commission, in certain circumstances, is to conduct an investigation to determine whether there exists or is threatened, "serious injury" to domestic industry caused "in major part" by trade agreement concessions. Section 301(c) provides that the Commission, if it makes such a determination, shall recommend a tariff increae or other import restriction "which is necessary to prevent or remedy such injury." The President may by proclamation increase or impose import restrictions under this

17. 19 U.S.C. § 1841.

18. 19 U.S.C. § 1842.

19. 19 U.S.C. § 1843.

20. *E. g.*, the Sugar Act of 1948, ch. 519, § 1 et seq., 61 Stat. 922-934, as amended, 7 U.S.C. § 1100 et seq.; the Meat Act of 1964, § 2, 78 Stat. 594.

21. Section 22(b) of the Agricultural Adjustment Act of 1933, as added, Act of August 24, 1935, ch. 641, § 31, 49 Stat. 773, as amended, 7 U.S.C. § 624(b).

22. *See, e. g.*, Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess. 2853-55 (1962); M.D.H. Smith, Voluntary Export Quotas and U.S. Trade Policy—A New Nontariff Barrier, 5 Law & Policy in Intl. Business 10, 31-32 (1973).

clause, but only after he receives an "affirmative finding" by the Commission. Section 351(a) of the Trade Expansion Act of 1962, 19 U.S.C. § 1981 (a).

b. *Orderly marketing agreements.*

Of particular pertinence is the alternative provision in § 352 of the Trade Expansion Act.[23] It provides that the President—after receiving the Tariff Commission's affirmative finding under § 301(b), and in lieu of issuing a proclamation imposing duty or other import restriction under § 351—may "negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing or threatening to cause serious injury to [a domestic] industry, whenever he determines that such action would be more appropriate to prevent or remedy serious injury to such industry than action under" § 351(a)(1). Here again there is indication of Congressional authorization as underpinning for Executive power to negotiate trade agreements, including those restricting imports.

c. *National security provision.*

Another provision for import restrictions, applicable to any commodity, is the "national security provision," which originated in the 1950's[24] and was transposed into § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862.

The term "national security" is given an expansive definition in § 232(c) of the Act,[25] which provides in part:

> In the administration of this section, the Director and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

The President may adjust imports under this provision, but only after the Director of the Office of Emergency Planning conducts an investigation and reports that continued importation of a commodity is a threat to national security. Section 232(d), 19 U.S.C. § 1862 (d), requires publication of a report of each investigation made by the Director and requires the Director to "publish procedural regulations to give effect to the authority conferred on him by subsection (b)." These regulations were intended to provide for public hearings except where it would be impracticable or injurious to the national security to do so.[26]

Existing regulations of the Office of Emergency Planning provide that public notice of an investigation shall appear in the Federal Register unless "contrary to the interests of national defense," and that interested parties shall have an opportunity to make written presentations, to inspect the presentations filed by other parties, and to submit rebuttal presentations. The Director also must "seek information or advice from appropriate Government departments and agencies" and may, "when he deems it appropriate," hold public hearings.[27]

The national security clause represents another Congressional action to authorize Executive adjustment of imports in times of domestic crisis, but,

23. Codified in 19 U.S.C. § 1982, and captioned "Orderly marketing agreements."

24. In Section 7 of the Trade Agreements Extension Act of 1955, 69 Stat. 162. This was modified by Section 8 of the Trade Agreements Extension Act of 1958, 72 Stat. 673.

25. 19 U.S.C. § 1862(c).

26. H.R.Rep.No.1761, 85th Cong., 2d Sess. 15 (1958).

27. O.E.P.Reg.No.4, Sec. 7(b), 7(e), 7(f); 32A C.F.R. 97 (1973).

once again, the Executive is not permitted to act in secrecy, without regard to interests that might be adversely affected.

* * *

Congress has enacted a comprehensive statutory scheme that identifies the Executive's role in shaping the terms of foreign trade. In doing so *Congress has* followed a well-established practice of combining broad executive discretion with procedural protection for those who may be affected by its exercise.[28] The only exception—in 7 U.S.C. § 1854, which permits the President to negotiate import restrictions on textiles and agricultural products without mandatory procedural prerequisites—proves the rule.

When the President's tariff adjustment authority, conferred by the Tariff Act of 1922, was challenged as an unconstitutional delegation of legislative power, the prerequisite of a Tariff Commission investigation and hearing was a prominent feature noted by the Supreme Court in its rejection of the challenge. *See* J. W. Hampton, Jr. & Company v. United States, 276 U.S. 394, 405, 48 S.Ct. 348, 72 L.Ed. 624 (1928).[29]

The procedures by which Congress has circumscribed executive power to shape the terms of foreign trade are no mere technicalities. While freeing the making of international trade policy from the encumbrances of the legislative process, Congress has sought to maintain public ventilation of the issues relevant to policy formation. To say, as the majority opinion does, that the steel arrangements worked out by the President fall within an inherent Presidential authority not preempted by Congress is to allow the circumvention of these procedural safeguards whenever that suits the Executive. If detailed letters of intent are no different from general appeals to industry, the President would be within his authority to enter into such letters-of-intent arrangements with all industry on every aspect of domestic, as well as foreign commerce. This is dangerous doctrine.

Whatever may be the President's prerogative when Congress has not spoken, it is untenable, in my view, to assert a continuing inherent Executive authority to negotiate import restraints outside and in disregard of a consistent and comprehensive Congressional pattern for protective procedures.

IV. PRIOR EXECUTIVE PRACTICE

The Government and the foreign steel producers urge on the court that Presidents have long negotiated restraints similar to the steel quotas without specific statutory authority, and that this tradition validates the President's action here. An appeal to past executive practice is not without relevance, but it is not decisive[30] and often raises as many questions as it purports to answer.

So far as this case is concerned, it suffices to say that while defendants cite examples of import restraints, described more fully in the Appendix, they fail to present a history of import restraints consistently negotiated by the President without regard for the pro-

28. *Compare* Natural Gas Act, § 5, 15 U.S.C. § 717d (FPC shall determine "just and reasonable rate[s]" after hearing); Federal Aviation Act of 1958, § 401, 49 U.S.C. § 1371 (Board may issue license to engage in air transportation if it finds, after hearing, that transportation is "required by the public convenience and necessity."); Communications Act of 1934, § 309, 47 U.S.C. § 309 (hearings may be held on licenses to be granted in the "public interest, convenience, and necessity.").

29. Professor Davis has suggested that a modern "delegation doctrine" should embody a quest for safeguards against arbitrary action, including open procedures where precise standards limiting executive discretion are not available. K.C. Davis, Administrative Law Text § 2.08 at 41 (3d ed. 1972). *Compare* Yakus v. United States, 321 U.S. 414, 433 ff., 64 S.Ct. 660, 88 L.Ed. 834 (1944); Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally, 337 F.Supp. 737, 759-762 (D.D.C., 3-judge court, 1971).

30. Wilderness Society v. Morton, 150 U.S. App.D.C. 121, 144, 479 F.2d 842, 865 (1973).

cedures established by Congress and so represented to the Congress.

In the seventeen Annual Reports on the Trade Agreements Program that the President has submitted to Congress every year since 1957, there is no indication that import limitations on foreign products were sought by the President of the United States acting outside statutory authority. The only exception is that of the steel import quotas involved in the case at bar, described in the reports of 1968 through 1971. Congress cannot fairly be said to have acquiesced in an executive practice perceivable only dimly if at all.

Some of the examples that the Government cites describe executive action colored with statutory authority. This characterization fairly describes the voluntary oil import program of 1957, the 1936 limitation on export of Canadian red cedar shingles, and six of the ten commodity limitations cited in Congressional testimony of Secretary of State Dulles.[31] Taken as a whole, the examples do not show that the President has consistently asserted an extra-statutory authority to regulate imports by agreements with foreign governments or firms.

Finally, all the import restraints cited by the defendants were obtained before the enactment of the Trade Expansion Act of 1962. When it enacted the Trade Expansion Act of 1962, Congress had an opportunity to review all of the President's power to regulate imports. In my view, the Act has scope as a Congressional preemption which "occupies the field" of import restrictions. This approach is heightened by the fact the 1962 Act included authority under § 201 that was expressly limited to run to June 30, 1967. Congress deliberately contracted Presidential latitude by permitting the expiration of that authority, as of July 1, 1967, notwithstanding Executive requests for extension.

V. DISPOSITION

This case must be decided as if the complaint had never contained a claim under the antitrust laws. However, in considering whether this is a claim on which relief may be given, I would take into account that relief in adjudicating invalidity may be wrought so as not to engender injustice in any future claim under the antitrust laws based on the conduct of the foreign producers. Any defense foreign producers might raise in future actions of reliance upon authoritative representations by government officials that an executive participation in the arrangement insulated them from antitrust liability would be undercut by a conclusion that executive participation is not authorized.

When a court is asked for a declaratory judgment—here that executive action restricting steel imports is invalid—it may act on the basis of equitable principles, and may respond to broad public interest concerns beyond those articulated by the parties. United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211 (1939). In this extraordinary situation, the steel producers have since 1969 engaged in actions designed to further an arrangement that all assumed was lawfuly entered into. The need to protect the reliance interests of these parties is highlighted by the complexity and the closeness of the issue of the validity of executive action. *Compare* Blair v. Freeman, 125 U.S.App.D.C. 207, 217, 370 F.2d 229, 239 (1966). Accordingly, in my view, a declaration that executive participation in the agreements is invalid should be given prospective effect only. This would permit courts to rule, should the question arise, that liabilities of the parties for acts prior to the effective date of the judgment be determined as if executive participation in the agreements were valid. *Compare* Zuber v. Allen, 131 U.S.App.D.C. 109, 124–125, 402 F.2d 660,

31. Hearings on Renewal of Trade Agreements Act Before the House Committee on Ways and Means, 85th Cong., 2d Sess. 399 (1958).

675–676 (1968), aff'd, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

It remains to consider the prospective effect that I would give a holding that the action here was outside Executive authority. It is likely that the Executive would have had authority to invoke the national security clause—if minded to do so after following its hearing procedures and appraising the comments of all affected interests. Here the Executive has failed to follow the procedures mandated by Congress. In reviewing the decision of an administrative agency that has not exceeded its powers but has failed to follow due procedures, we have, in appropriate cases, remanded the action to the agency to allow subsequent correction of the deficiency, without destroying the original decision. *See* Kennecott Copper Corporation v. EPA, 149 U.S.App.D.C. 231, 462 F.2d 846 (1972); International Harvester Company v. Ruckelshaus, 155 U.S.App.D.C. 411, 478 F.2d 615 (1973); Portland Cement Association v. Ruckelshaus, 158 U.S.App. D.C. 308, 486 F.2d 375 (1973), cert. denied, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974). I believe that an analogous disposition would be appropriate for the present case. I would withhold the court's mandate for a period of 90 days. This would permit the President, if he should conclude that it is now desirable to limit steel imports and that either the escape clause or the national security provision is applicable, to invoke their procedures.

Alternatively, the President may wish to seek legislation authorizing him to negotiate the kind of voluntary import restraints at issue here, or perhaps broader import control authority. The terms and history of any such legislation might support a ruling of a ratification of the authority of the President to achieve the steel arrangements before us. I would consider it appropriate to entertain an application by the Government for this court to stay its mandate so as to provide a reasonable opportunity to consider validating legislation.

Although I would decide this case against the executive, I am sensitive to the delicacy of the issue of preemption. Where, as here, the power of Congress to regulate a matter committed expressly to it by the Constitution is at stake, a close case should be decided so as to protect Congressional power. But it is likewise appropriate, in a matter so laced with delicate international relationships, for the court to shun a Procrustean rigidity in deference to possible clarification or correction by the President and Congress together.

Appendix: Executive Limitation of Imports Outside Statutory Authority

The Government and the domestic steel producers cite four examples in support of their contention that there exists a "long-standing executive practice" of obtaining import restrictions without resort to any statutory authority. I will discuss each of these seriatim.

I. Restrictions on Japanese Imports During 1930 Decade

On October 12, 1935, the State Department announced that Japanese exporters were restricting their shipments of cotton piece goods to the Philippine Islands (then an American protectorate) to a fixed annual quota, "provided there is no increase in the Philippine tariff." 3 Foreign Relations of the United States, 1935, at 1008–09 (1953). Although the Department's release described the arrangement as unilateral [illegible] by Japanese manufacturers, a memoranda of talks during the preceding six months between Department officials and the Japanese ambassador refer to the arrangement as an "agreement" or a "gentlemen's agreement." *See* 3 Foreign Relations of the United States, 1935, *supra*, at 951–1048.

On December 21, 1935, similar restrictions on the export of Japanese cotton goods to the United States were announced. 13 State Department Press

Releases 581 (1935). The Department's press release stated that the Japanese ambassador was responding to State Department suggestions that "some agreement be reached providing for voluntary control by Japanese exporters."

On April 4, 1936, the State Department announced that Japanese exporters of cotton rugs had agreed to observe annual quotas on specific products. 14 State Department Press Releases 291 (1936).

The foregoing arrangements were all negotiated through regular diplomatic channels rather than by direct government-to-industry communication.

II. Limitation on Canadian Red Cedar Shingles, 1936

The defendants also cite a 1936 statement by Senator Nye. The statement describes an agreement with Canada to limit the import of Canadian red cedar shingles to 25% of the domestic consumption, *see* 80 Cong.Rec. 9107-08 (1936), but it adverts to the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943, which empowers the President to "enter into foreign trade agreements with foreign governments or instrumentalities thereof" and to proclaim "such additional import restrictions . . . as are required or appropriate to carry out any foreign trade agreement the President has entered into."

III. The List Presented by Secretary of State Dulles

Voluntary restraints pertaining to ten commodities were cited by Secretary of State Dulles in testimony before the House Ways and Means Committee, during its consideration of the Trade Agreements Extension Act of 1958. Hearings on Renewal of Trade Agreements Act Before the House Committee on Ways and Means, 85th Cong., 2d Sess. 399 (1958). The commodities are simply listed as "items on which voluntary quotas have been imposed since January 1, 1953, by exporting countries." No information is given as to the character of the restraints, the dates on which they were imposed, or their duration. Moreover, the President appears to have acted in this case within the broad authority given him by the Trade Agreements Extension Acts of 1951, 1953 and 1955. The President was empowered in pursuance of trade agreements made under these Acts to impose additional imports restrictions as are appropriate to carry out any foreign trade agreement, as well as to implement restrictions under the escape clause, or, after 1955, the national security provision.

Procedural requirements were attached to the exercise of these statutory powers, and with respect to most of the commodities these requirements were substantially met. (See Table 1.) All but two of the commodities (items 5 & 7) were the subject of Tariff Commission investigation and hearings. The Commission recommended relief on six of the eight commodities which were the subject of an investigation (items 1, 3, 4, 6, 9, 10), and the President proclaimed restrictions on five of these (items 1, 3, 4, 6, 9).

The pattern is not entirely consistent. Voluntary restraints may have been negotiated on hardwood, plywood, sewing machines, toyo cloth caps, and tuna without Commission action. Yet the evidence taken as a whole negatives the assumption of a deliberate, advertent disregard of statutory procedures, predicated on an asserted inherent executive authority untrammeled by Congressional action. In my view, the information provided to Congress was not sufficient to put Congress on notice that Presidential power to act outside statutory authority was being claimed, and it is insufficient now to establish Congressional acquiescence.

IV. 1956 Agreement With Japan Limiting Textile Imports

On May 16, 1956, the United States concluded an agreement with Japan limiting the import of Japanese textiles. The agreement resulted from communications between the governments since 1955, a period during which domestic manufacturers had expressed great concern about Japanese textile imports and had filed several petitions before the Tariff Commission[1] for escape clause relief.

At approximately the same time, proposed legislation that eventually became § 204 of the Agricultural Act of 1956, 70 Stat. 188, was pending in Congress. It would authorize the President to negotiate with foreign governments in order to obtain agreements limiting imports of agricultural commodities or textile products, and to issue regulations governing the entry or withdrawal from warehouse of products subject to such agreements. *See* H.R.Report No.1986, 84th Cong., 2d Sess. 15 (1956). The legislation that included this provision was passed by both houses of Congress, but was vetoed because of its commodity price support provisions. *See* 102 Cong.Rec. 6107 (Senate passage), 6158 (House passage), 6317–18 (President's veto message) (1956).

An identical provision was incorporated in legislation introduced in the House after the veto, *see* 102 Cong.Rec. 7229 (1956); H.R.Rep.No.2077, 84th Cong., 2d Sess. 8–9 (1956), and its applicability to the then-prevailing concern about Japanese textile imports was pointed out by Representative Cooley, House sponsor of the bill. *See* 102 Cong.Rec. 7346 (1956). Legislation delegating the new authority was passed by both houses[2] and was signed into law on May 28, 1956.[3]

The agreement with the Japanese government was concluded eight days before the authorizing legislation received final approval, but the quotas were not announced publicly until January, 1957. In context, the exchange of notes was a de facto interchange in contemplation of the de jure executive authority that Congress was about to provide. To all public appearances the textile quotas were not established until after the authorizing legislation had been enacted. Subsequent to 1956 the statute has been represented to Congress, and cited by commentators, as the authority for the agreement. *See* Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess. 3794 (1962) (testimony of Secretary of Commerce Hodges); M.D.H. Smith, Voluntary Export Quotas and U. S. Trade Policy—A New Nontariff Barrier, 5 Law & Policy in Int'l. Business 10, 31–32 (1973).

V. Voluntary Quotas on Oil Imports

In July, 1954, President Eisenhower established an Advisory Committee on Energy Supplies and Resources Policy to study the development of energy resources. *See* Report of the Presidential Advisory Committee on Energy Supplies and Resources Policy, 1955–56, February 26, 1955, *quoted in* Cabinet Task Force on Oil Import Control, The Oil Import Question 163 (1970) (hereinafter cited as Oil Import Question). In November, 1954, a task force appointed by the Committee concluded that there was a possible threat to national security in "reliance beyond present relative levels on foreign crude oil to supply domestic markets" and recommended that the existing ratio of imports to domestic production be maintained by "voluntary, *individual* action of the importing companies." Oil

1. The negotiation of the agreement and its terms are described in W. Hunsberger, Japan and the United States in World Trade 317–22 (1964).

2. *See* 102 Cong.Rec. 7450 (House passage), 8514 (Senate passage). The Conference Report on the legislation, which resolved differences between the houses not material here, was adopted on May 23. *See* 102 Cong.Rec. 8684 (Senate passage), 8832 (House passage).

3. *See* 102 Cong.Rec. 9769 (Presidential approval).

Import Question 171 (emphasis added). The Advisory Committee, in its report to the President in February, 1955, followed these recommendations. Oil Import Question 165–166. It is unclear precisely what, if any, government action followed from the Committee report. It was apparently limited to exhortations to oil-importing companies to exercise restraint. First Annual Report on the Operation of the Trade Agreements Program, H.Doc.No.93, 85th Cong., 1st Sess. 10 (1957).

The national security provision was enacted in June, 1955, in part because of concern with the President's authority to deal with oil imports. On October 17, 1956, the Presidential Advisory Committee renewed its recommendation to the President that the 1954 ratio be maintained in all but one region of the United States, but again recommended only voluntary, individual action. Oil Import Question 176–78. On October 22, however, the Director of the Office of Defense Mobilization held hearings in response to a petition that had been filed by petroleum companies in August, 1956, requesting action under the national security provision. At the hearing, the Director received views supporting and opposing Section 7 action to limit oil imports. On April 23, 1957, he advised the President that "[p]ursuant to section 7 of the Trade Agreements Extension Act of 1955 . . . I have reason to believe that crude oil is being imported into the U.S. in such quantities as to threaten to impair the national security." Oil Import Questions 183, 194.

On June 26, the President established a Special Cabinet Committee to Investigate Crude Oil Imports, which on July 29 reported with a plan for limiting oil imports into each region, with import volume limits for individual companies to be determined and administered by the Department of the Interior and the Office of Defense Mobilization. The Committee's proposal contemplated voluntary compliance by the petroleum companies, but concluded that if no such compliance was forthcoming the President should "find that there is a threat to the national security within the meaning of Section 7. . . ." Oil Import Question 186. The President immediately directed the Secretary of the Interior and the Director of O.D.M. to implement the Committee's proposal.

The Voluntary Oil Import Program thus established continued for nearly two years. The President's Special Committee maintained oversight and, in January, 1959, requested that the Director of the Office of Civil and Defense Mobilization initiate another investigation. On February 27, 1959, the Director made another finding of harm to national security, and on March 10 the President proclaimed mandatory quotas, invoking his section 7 powers. Oil Import Question 195–203.

Although the defendants cite the oil program of 1957 as an illustration of Presidential establishment of "voluntary" limitation of imports, without the aid of statutory authority, the program was created only after the Director of O.D.M. held hearings and made the finding mandated by section 7. The Special Committee's plan and the President's approval of it were reported to Congress as actions under the national security amendment to the trade acts. *See* Second Annual Report on the Trade Agreements Program, H.Doc.No.384, 85th Cong., 2d Sess. 8 (1958); Third Annual Report of the President of the United States on the Trade Agreements Program 12 (1959). The President did not invoke the full extent of his section 7 authority, but, having complied with the statutory procedures, the President was entitled to exercise less than the full measure of his statutory authority.[4] The voluntary program limiting oil imports

4. This conclusion is strengthened by a later representation to Congress that the President's actions were taken pursuant to the national security provision. *See* Hearings on Renewal of Trade Agreements Act Before the House Committee on Ways and Means, 85th Cong., 1st Sess. 2685 (1958) (statement of Deputy Under Secretary of State C. Douglas Dillon).

Commodity	Tariff Commission Action	Authority for TC Action	Presidential Action
3. Lead & Zinc	a. Hearings held Nov. 3-6, 1953. Recommended modification of concession May 21, 1954. b. Hearings held Nov. 19-26, 1957. Recommended modification of concessions April 24, 1958. Commission unanimously recommended escape-clause relief but divided (3-3) on remedy.* Three Commissioners recommended raising duties and establishing quotas; remaining three recommended raising duties only.	escape clause	a. President rejected Commission recommendations of May 21, 1954, on Aug. 20, 1954. b. President proclaimed quotas Sept. 22, 1958, following divided vote of Commission.
4. Oats	a. Hearings held July 7-8, 1953. Recommended import quotas. b. Hearings held Sept. 8, 1954. Recommended import quotas.	§ 22 Agricultural Adjustment Act	a. President announced no action on Canadian oats in view of Canadian decision to limit shipments until Oct. 1, 1954. Quota on all other oats proclaimed Dec. 26, 1953. b. President proclaimed quotas on all oats Oct. 4, 1954.

* § 20(d) of Trade Agreements Extension Act of 1953 provides that where Commission divides 3-3, President may treat findings and recommendations of either group as findings of entire Commission.

Commodity	Tariff Commission Action	Authority for TC Action	Presidential Action
5. Sewing machines	None recommended.	——	Voluntary limitation by exporting country.
6. Stainless-steel table flatware	a. Hearings held July 16-19, 1957. Recommended withdrawal of concession Jan. 10, 1958. Commission divided (3-3) on remedy. Three members recommended withdrawal of concession as to all flatware; remaining three recommended withdrawal with respect to certain items. b. Following President's deferral of action, held hearings April 21-22, 1959 and submitted supplemental report to President July 24, 1959. Additional recommendations, if any, unknown.	escape clause	a. March 7, 1958, deferred action on Commission recommendation in view of voluntary limitation of exports by Japan; requested supplementary report from Commission. b. Oct. 20, 1959 President proclaimed tariff quotas.
7. Toyo cloth caps	Investigation instituted April 5, 1957, and dismissed without hearing June 21, 1957.	escape clause	Voluntary limitation by exporting country.
8. Tuna	a. Hearings held Jan.-Feb., 1952; recommended no modification of trade concessions on Nov. 26, 1952.	escape clause	Voluntary limitation by exporting country.

Commodity	Tariff Commission Action	Authority for TC Action	Presidential Action
9. Tung oil & tung nuts	a. Investigation and hearings held May 4-5 & 7-8, 1953; Commission recommended no action. b. Hearings held Aug. 10, 1954. Recommended aggregate quotas. c. Hearings held May 2-3, 1957. Recommended import fee (tung oil only). d. Hearings held March 10, 1958; recommended tung oil contained in tung nuts be brought within existing quota on oil.	§ 22 Agricultural Adjustment Act	a. No Presidential action. b. President took no action in view of voluntary undertakings by Argentina and Paraguay. c. Quotas imposed by Presidential proclamation Sept. 9, 1957, to last until 1960. d. President implemented Commission recommendations on April 28, 1958.
10. Wood screws	a. Investigation without hearings completed Dec. 29, 1951. Recommended no modification of concession. b. Hearings held June 30-July 1, 1952. Recommended no modification of concession March 27, 1953. c. Hearings held May 26-27, 1954. Commission divided equally (3-3) on whether relief warranted October 28, 1954. d. Investigation instituted Jan. 26, 1956; discontinued April 9, 1956, at request of applicant.	escape clause	Following report of equally divided Commission of Oct. 28, 1954, President decided against modifying concession; voluntary limitation by exporting country followed.

CONSUMERS UNION OF U. S., INC.,
Plaintiff,

v.

William P. ROGERS, Secretary of State, et al.

Civ. A. No. 1029-72.

United States District Court,
District of Columbia.

Jan. 8, 1973.

Consumer organization filed suit challenging legality of voluntary restraint arrangements on steel which were mutually made between certain foreign steel companies as a result of negotiations initiated by Secretary of State at the direction of the President. On cross motions for summary judgment, the District Court, Gesell, J., held that a flat agreement among private foreign

producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act, that Executive had no authority to exempt the voluntary restraint arrangements on steel from antitrust laws, that such arrangements were not exempt, that Executive was not preempted from entering into agreements or diplomatic arrangements with private foreign steel concerns and could enter into such undertakings so long as they did not violate legislation regulating foreign commerce and that such undertakings were not required to be first processed under Trade Expansion Act of 1962.

Motions for summary judgment denied to extent inconsistent with opinion.

1. Constitutional Law ⇐67

The courts have no general role in shifting emphasis between competing branches of government; it is only when a distinct aspect of struggle surfaces into a clearly justiciable controversy that a court must act, and then court should apply well-settled legal principles to limited dispute presented, leaving ultimate solutions to the democratic processes.

2. United States ⇐28

A general statute of uncertain application like the Sherman Act was not intended to preempt from the President his independent authority over foreign commerce. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A.Const. art. 1, § 8; art. 2, § 1 et seq.

3. United States ⇐28

The President has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactments any more than President can grant immunity under such laws. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A.Const. art. 1, § 8; art. 2, § 1 et seq.; Trade Expansion Act of 1962, §§ 102–361, 19 U.S.C.A. §§ 1801–1991.

4. Monopolies ⇐17(5), 24(1), 28(1), 29, 30

A flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act, and to extent participants are subject to jurisdiction of United States courts, criminal penalties may be imposed and civil actions for damage or equitable relief may be pressed. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. United States ⇐28

The President must faithfully execute the law, and he cannot create his own exceptions thereto.

6. United States ⇐40

When representatives of the Executive Branch venture into areas where antitrust laws have apparent application, representatives must proceed with strict regard for legislation outlawing restraints of trade so that no action taken will be inconsistent with the clear requirements of settled national policy. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A.Const. art. 1, § 8; art. 2, § 1 et seq.; Trade Expansion Act of 1962, §§ 102–361, 19 U.S.C.A. §§ 1801–1991.

7. Monopolies ⇐12(7)
United States ⇐28

The President had no authority under Constitution or acts of Congress to exempt voluntary restraint arrangements on steel, which had been negotiated between certain foreign steel companies as result of negotiations initiated by Secretary of State at direction of the President, from antitrust laws, and such arrangements were not exempt. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A.Const. art. 1, § 8; art. 2, § 1 et seq.; Trade Expansion Act of 1962, §§ 102–361, 19 U.S.C.A. §§ 1801–1991.

8. United States ⇐28

The Executive was not preempted by Sherman Act and Trade Expansion Act of 1962 from entering into agreements or diplomatic arrangements with

private foreign steel concerns with respect to importation of steel, and Executive could enter into such undertakings so long as they were not violative of legislation regulating foreign commerce, such as the Sherman Act, and such undertakings were not required to be first processed under the Trade Expansion Act of 1962. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U. S.C.A.Const. art. 1, § 8; art. 2, § 1 et seq.; Trade Expansion Act of 1962, §§ 102–361, 19 U.S.C.A. §§ 1801–1991.

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Monroe Leigh, Richard A. Whiting, Daniel J. Plaine, Steptoe & Johnson, Washington, D. C., William B. Pennell, Shearman & Sterling, New York City, for British Steel Corp.

Noel Hemmendinger, Nelson A. Stitt, John A. Kennedy, Jr., Washington, D. C., for Nippon Steel Corp.

MEMORANDUM OPINION, DECLARATION AND ORDER

GESELL, District Judge.

Consumers Union of U. S., Inc., by amended complaint filed October 5, 1972, has challenged the legality of so-called Voluntary Restraint Arrangements on Steel which were mutually made between certain foreign steel companies as a result of negotiations initiated by the Secretary of State at the direction of the President. Under these arrangements, nine Japanese steel companies, British Steel Corp., and various Western European steel manufacturers belonging to the European Coal and Steel Community by detailed agreements undertook to reduce substantially the amounts of steel they would import into the United States for domestic sale. These arrangements, which have been monitored and assisted by the Secretary, were consummated in May, 1972, and are to continue through the calendar year 1974. They affect 85 percent of United States steel imports and were widely publicized through press releases and transmittals to appropriate congressional committees.

Plaintiff, a recognized consumer organization, contends that the actions of the State Department officials in stimulating and implementing these arrangements are, in effect, *ultra vires*, and that no member of the Executive Department, including the President, has power under the Constitution and laws of the United States to enter into or to arrange the resulting restrictions on foreign commerce in steel. A declaratory judgment and injunction are sought. The matter comes before the Court on cross-motions for summary judgment, on agreed documents and statements of fact, and the admittedly novel issues

have been very thoroughly briefed and extensively argued.[1]

It was initially alleged that the steel arrangements violate the Sherman Act but this contention was dismissed by plaintiff, with prejudice, although the contention continues to be made in support of plaintiff's general position that any restraint offensive under the antitrust laws cannot be negotiated by the President or his representatives in view of congressional preemption in this field. Plaintiff now asserts that under Article I, Section 8, of the Constitution, Congress has authority to regulate domestic and foreign trade and that the enactment of the Sherman Act, coupled with enactment of the Trade Expansion Act of 1962,[2] blankets the field to the exclusion of any residual power in the President to take unilateral action with private companies which is contrary to the intendment of these statutes. In urging that these two statutes, by implication, deprive the President of any authority which he might otherwise have under Article II of the Constitution, plaintiff emphasizes the scope of antitrust prohibitions and the existence of a specific trade agreement as to steel approved under the congressional scheme for regulatory tariffs and imports.

Defendants respond that only the most general legislation designed to encourage competition and free trade is in effect and that this legislation cannot be read to carry an explicit preemption. Accordingly, the Government suggests the President retains his power in the field of foreign affairs to act through "diplomacy" and bring about such arrangements with private foreign companies as he feels are in the best interests of the country.

[1] Obviously this litigation raises novel and difficult constitutional questions which have wide import. The Court recognizes that it will be well advised to avoid any decision that reaches beyond the specific dispute presented. Some observers note a gradual erosion of congressional authority in favor of the Executive, which is said to reflect the growing complexity of our society and widening involvement in foreign affairs. Others suggest the trend reflects stultifying inhibitions built into congressional processes and other factors. The courts have no general role in this shifting emphasis between competing branches of government. It is only when a distinct aspect of the struggle surfaces into a clearly justiciable controversy that a court must act. When this occurs, the Court should apply well-settled legal principles to the limited dispute presented, leaving ultimate solutions to our democratic processes.

[2] All parties recognize that if in fact Congress has preempted the relevant field of foreign trade and commerce, then the President lacks authority to act in a manner inconsistent with the requirements of the preemption legislation. The steel arrangements were made although a specific trade agreement as to steel was in effect. Plaintiff points to the failure to ventilate the arrangements in advance under the procedures contemplated by the Trade Expansion Act of 1962 and contends that in view of the breadth of antitrust regulation it is only in this fashion that the President could have proceeded. This goes too far. To be sure, if the avenue chartered in the Trade Expansion Act of 1962 had been available and had been pursued, there would be no question of the legality of the Executive action taken and even immunity under the Sherman Act might well be implied. Although this was not done, there is nothing in the Trade Expansion Act of 1962 that makes its processes exclusive. No can it be said that a general statute c

1. Standing is not seriously challenged and is well established by the cases and considerations reviewed in National Association of Railroad Passengers v. Central of Georgia Ry., U.S.App.D.C. (No. 71-1546, decided January 5, 1973).

2. 19 U.S.C. §§ 1801-1991 (1965).

uncertain application like the Sherman Act was intended to preempt from the President his independent authority over foreign commerce. Compare the legislation and facts involved in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). While the legislative pattern is indeed comprehensive and the President's authority has been narrowed, these acts cannot be read as a congressional direction to the President prohibiting him from negotiating in any manner with private foreign companies as to commercial matters. Far more explicit legislation would be required to deprive the President of this authority in foreign affairs where his preeminent role has quite properly long had firm constitutional recognition.

[3-5] On the other hand, the Government's argument also overreaches. The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws. A flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act and to the extent participants are subject to the jurisdiction of our courts criminal penalties may be imposed and civil actions for damage or equitable relief may be pressed. United States v. National Lead Co., 63 F.Supp. 513 (S.D.N.Y.1945), aff'd, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); *see also*, United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The President must faithfully execute the law and cannot permit his subordinates to be participants in such a combination or agreement. There is no basis in the Constitution or case law for a contrary conclusion. Defendants cite Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but the exception from Sherman Act strictures there recognized was based on legislative action and it cannot be said that the Executive charged with responsibility to execute the law can also create his own exceptions.

[6] Obviously when representatives of the Executive Branch venture into areas where the antitrust laws have apparent application, they must proceed with strict regard for legislation outlawing restraints of trade so that no action taken will be inconsistent with the clear requirements of settled national policy. The implications of recognizing authority in the Executive to cartelize segments of our trade need no special emphasis except as they caution against attempting to imply authority where it has been clearly removed.

[7] The Court declares that the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt.

[8] The Court further declares that the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962.

The foreign companies who were apparently persuaded by the Secretary to enter into the steel arrangements proceeded on the stated assumption that the mutual agreements achieved were legal under American law and presumably immune from Sherman Act scrutiny. While official assurances to this effect may or may not have been given, there is no doubt that the companies proceeded in the belief the arrangements were legal under our law and the quiescence of all public authorities of the United States on this score was notable. Because of the Amended Complaint, the question of whether or not a violation of

the Sherman Act is present is not before the Court to decide. However, it is apparent on this limited record that very serious questions can and should be raised as to the legality of the arrangements under the Act and that the undertakings of the foreign steel companies were made on a mistaken assumption which at least was encouraged, albeit in good faith, by the Secretary.

The parties are urged to re-examine their positions and premises in the light of this memorandum and the declarations made.

No injunction is appropriate. To the extent the respective motions for summary judgment are inconsistent with the above declarations they are denied. No further proceedings are required. No costs will be awarded.

So ordered.

SUBCHAPTER III.—TARIFF ADJUSTMENT AND OTHER ADJUSTMENT ASSISTANCE

PART I.—ELIGIBILITY FOR ASSISTANCE

§ 1901. Tariff Commission investigations and reports—Petitions for tariff adjustment or for determination of eligibility to apply for adjustment assistance; filing; transmission of copy to Secretary of Commerce

(a) (1) A petition for tariff adjustment under section 1981 of this title may be filed with the Tariff Commission by a trade association, firm, certified or recognized union, or other representative of an industry.

(2) A petition for a determination of eligibility to apply for adjustment assistance under part II of this subchapter may be filed with the Tariff Commission by a firm or its representative, and a petition for a determination of eligibility to apply for adjustment assistance under part III of this subchapter may be filed with the Tariff Commission by a group of workers or by their certified or recognized union or other duly authorized representative.

(3) Whenever a petition is filed under this subsection, the Tariff Commission shall transmit a copy thereof to the Secretary of Commerce.

Investigation of articles imported in such increased quantities as to cause, or threaten to cause, serious injury to domestic industry; consideration of economic factors; findings; prior investigations

(b) (1) Upon the request of the President upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon the filing of a petition under subsection (a) (1) of this section, the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.

(2) In making its determination under paragraph (1), the Tariff Commission shall take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or underemployment.

(3) For purposes of paragraph (1), increased imports shall be considered to cause, or threaten to cause, serious injury to the domestic industry concerned when the Tariff Commission finds that such increased imports have been the major factor in causing, or threatening to cause, such injury.

(4) No investigation for the purpose of paragraph (1) shall be made, upon petition filed under subsection (a) (1) of this section, with respect to the same subject matter as a previous investigation under paragraph (1), unless one year has elapsed since the Tariff Commission made its report to the President of the results of such previous investigation.

Investigations in cases of petitions by firms or groups of workers for determination of eligibility to apply for adjustment assistance

(c) (1) In the case of a petition by a firm for a determination of eligibility to apply for adjustment assistance under part II of this subchapter, the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article like or directly competitive with an article produced by the firm is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to such firm. In making its determination under this paragraph, the Tariff Commission shall take into account all economic factors which it considers relevant, including idling of productive facilities of the firm, inability of the firm to operate at a level of reasonable profit, and unemployment or underemployment in the firm.

(2) In the case of a petition by a group of workers for a determination of eligibility to apply for adjustment assistance under part III of this subchapter, the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article like or directly competitive with an article produced by such workers' firm, or an appropriate subdivision thereof, is being imported into the United States in such increased quantities as to cause, or threaten to cause, unemployment or underemployment of a significant number or proportion of the workers of such firm or subdivision.

(3) For purposes of paragraphs (1) and (2), increased imports shall be considered to cause, or threaten to cause, serious injury to a firm or unemployment or underemployment, as the case may be, when the Tariff Commission finds that such increased imports have been the major factor in causing, or threatening to cause, such injury or unemployment or underemployment.

Public hearings

(d) (1) In the course of any investigation under subsection (b) (1) of this section, the Tariff Commission shall, after reasonable notice, hold public hearings and shall afford interested parties opportunity to be present, to produce evidence, and to be heard at such hearings.

(2) In the course of any investigation under subsection (c) (1) or (c) (2) of this section, the Tariff Commission shall, after reasonable notice, hold public hearings if requested by the petitioner, or if, within 10 days after notice of the filing of the petition, a hearing is requested by any other party showing a proper interest in the subject matter of the investigation, and shall afford interested parties an opportunity to be present, to produce evidence, and to be heard at such hearings.

Amount of increase in, or imposition of, any duty or other import restriction necessary to prevent or remedy injury; findings and report to President

(e) Should the Tariff Commission find with respect to any article, as the result of its investigation, the serious injury or threat thereof described in subsection (b) of this section, it shall find the amount of the increase in, or imposition of, any duty or other import restriction on such article which is necessary to prevent or remedy such injury and shall include such finding in its report to the President.

Report of investigations to President; transcript of hearings and briefs; time of report; publication in Federal Register

(f) (1) The Tariff Commission shall report to the President the results of each investigation under this section and include in each report any dissenting or separate views. The Tariff Commission shall furnish to the President a transcript of the hearings and any briefs which may have been submitted in connection with each investigation.

(2) The report of the Tariff Commission of its determination under subsection (b) of this section shall be made at the earliest practicable time, but not later than 6 months after the date on which the petition is filed (or the date on which the request or resolution is received or the motion is adopted, as the case may be). Upon making such report to the President, the Tariff Commission shall promptly make public such report, and shall cause a summary thereof to be published in the Federal Register.

(3) The report of the Tariff Commission of its determination under subsection (c) (1) or (c) (2) of this section with respect to any firm or group of workers shall be made at the earliest practicable time, but not later than 60 days after the date on which the petition is filed.

Time for filing petitions and for making requests, resolutions, or motions

(g) Except as provided in section 257(c) (3), no petition shall be filed under subsection (a) of this section, and no request, resolution, or motion shall be made under subsection (b) of this section, prior to the close of the 60th day after October 11, 1962. Pub.L. 87-794, Title III, § 301, Oct. 11, 1962, 76 Stat. 883.

§ 1982. Orderly marketing agreements; negotiation; regulations governing entry or withdrawal from warehouse

(a) After receiving an affirmative finding of the Tariff Commission under section 1901(b) of this title with respect to an industry, the President may, in lieu of exercising the authority contained in section 1981(a) (1) of this title but subject to the provisions of sections 1981(a) (2), (3), and (4) of this title, negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing or threatening to cause serious injury to such industry, whenever he determines that such action would be more appropriate to prevent or remedy serious injury to such industry than action under section 1981(a) (1) of this title.

(b) In order to carry out an agreement concluded under subsection (a) of this section, the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by such agreement. In addition, in order to carry out a multilateral agreement concluded under subsection (a) of this section among countries accounting for a significant part of world trade in the article covered by such agreement, the President is also authorized to issue regulations governing the entry or withdrawal from warehouse of the like article which is the product of countries not parties to such agreement. Pub.L. 87-794, Title III, § 352, Oct. 11, 1962, 76 Stat. 901.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1097

CONSUMERS UNION OF UNITED STATES, INC., PETITIONER

v.

HENRY A. KISSINGER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 506 F. 2d 136. The opinion of the district court (Pet. App. 30a-35a) is reported at 352 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1974, and a timely petition for rehearing was denied on December 2, 1974. The petition for a writ of certiorari was filed March 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the underlying controversy, a challenge to voluntary arrangements negotiated with foreign

producers, at the direction of the President, to restrain exports of steel into the United States, is now moot by reason of the expiration of the arrangements and the subsequent congressional revision of the statutory provisions which petitioner contends preempted the President's authority.

2. Whether the lower courts correctly held that congressional enactment of the Trade Expansion Act of 1962 occupied only the field of enforceable international trade agreements and did not preclude the President from negotiating the voluntary restraint arrangements.

STATEMENT

1. In 1968, in response to a serious problem posed by increasing steel imports into the United States, the Secretary of State, at the direction of President Johnson, negotiated arrangements with representatives of foreign steel producers under which those producers voluntarily undertook to limit exports of steel to the United States for a three-year period, ending December 31, 1971 (D.C. Cir. App. 119a–120a, 30a–35a).[1] Early in 1970, the State Department began considering the question of extending the voluntary arrangements for a limited period of time. The question of extension was submitted for review to the Under Secretaries Committee of the National Security Council, which recommended to the President that the exten-

[1] "D.C. Cir. App." refers to the joint appendix in the court of appeals, which has been furnished to this Court by petitioner.

sions be sought and suggested modified terms for the arrangements (D.C. Cir. App. 121a, 154a).[2] Following receipt of a directive from the President that extensions of the arrangements be sought, the State Department commenced negotiations with representatives of the Japanese and European steel industries, which now also included representatives of the British steel industry[3] (D.C. Cir. App. 122a). Following these negotiations, the arrangements were entered into for the period 1972–1974. These arrangements, which were the ones effective during the pendency of this action, were embodied in separate letters to the Secretary of State from representatives of the steel producers of the European Economic Community, including the United Kingdom, and the Japan Iron and Steel Exporters' Association, dated May 2, 1972, and May 4, 1972, respectively. Both letters were made public by a presidential statement on May 6, 1972. The arrangements expired by their own terms on December 31,

[2] In the course of reporting out proposed trade legislation during 1970, the House Ways and Means Committee formally requested the President to extend the voluntary steel arrangements. H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 92 (1970) (D.C. Cir. App. 120a–121a, 153a–154a).

[3] During the course of these negotiations, State Department officials met with various domestic interests—including steel producers and importers, labor union officials, members of Congress, and other interested agencies of the Executive Branch, as well as representatives of petitioner Consumers Union—to obtain their views regarding the arrangements. During the negotiations, the State Department officials, while aware of the views of the various interested groups, spoke for and represented the policy judgments of the United States government alone (D.C. Cir. App. 122a–123a, 154a–156a).

1974 (D.C. Cir. App. 123a, 126a–145a, 147a–148a, 156a).

In examining the possible alternatives and deciding in favor of negotiating the temporary voluntary limitations with foreign steel producers, the President and his advisers took into consideration a broad range of factors: domestic economic problems, the impact of proposed protectionist legislation, the government's policy with respect to international trade and, most basically, the foreign relations of the United States. The principal objective was to develop a solution which would have the least adverse effect on our foreign trade and foreign relations (D.C. Cir. App. 117a–118a). The Executive Branch concluded that voluntary undertakings by foreign steel producers to limit their exports of steel mill products to the United States would provide the best solution. It was concluded that such a program would provide flexible limitations of limited duration, would have few implications for the treatment of other products, would not face the same danger of retaliation based upon the GATT as would unilaterally imposed quotas, and would therefore minimize or avoid a disruptive impact on the foreign relations of the United States (D.C. Cir. App. 117a, 151a).[4]

[4] The affidavit of Julius L. Katz, Deputy Assistant Secretary of State for International Resources and Food Policy, dated August 25, 1972, showed that the development of these arrangements avoided what could have been an abrasive situation between the United States and the nations whose steel producers undertook to limit exports. The governments of these nations had notice of the continuing negotiation of the arrangements and implicitly acquiesced in them. This acquiescence was manifested not

2. Petitioner filed suit in May of 1972 challenging the President's power to negotiate arrangements with foreign steel producers for a voluntary temporary limitation on their exports of steel to the United States and seeking declaratory and injunctive relief. The original complaint, brought against the Secretary and a Deputy Assistant Secretary of State and several foreign and domestic steel producers and associations, asserted two claims: (1) that all of the defendants, including the Secretary, were engaged in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and (2) that the President had exceeded his constitutional and statutory authority in negotiating and obtaining the voluntary arrangements, without adhering to the procedural requirements of the Escape Clause provisions of the Trade Expansion

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only by the failure to object to these developments, but also by the fact that the steel producers involved have very close ties to, and in some cases are owned by, their respective governments. In the judgment of the State Department, any attempt to persuade other governments themselves to enter into export agreements would have adversely affected United States foreign relations. Moreover, foreign governments would have been reluctant to conclude such agreements directly because of their precedential effect with regard to other industries and commodities, because of the prospect of adverse political consequences, and because trade restrictions embodied in formal government-to-government agreements might tend to be more permanent. These foreign governments recognized, as the Executive Branch had concluded, that the voluntary arrangements represented the best solution to a situation which threatened to impair good trade relations between the United States and the other nations involved (D.C. Cir. App. 123a–124a).

Act of 1962, 19 U.S.C. 1982[5] (D.C. Cir. App. 10a–55a). After the State Department defendants filed a motion to dismiss the complaint or for summary judgment (D.C. Cir. App. 110a–111a), petitioner stipulated to the dismissal with prejudice of its claim of antitrust violation (D.C. Cir. App. 158a–161a). Petitioner then filed an amended complaint against all defendants limited to the issue of presidential power (D.C. Cir. App. 162a–192a).

The district court held that the President's constitutional foreign affairs power gave him concurrent authority to take action in the area of foreign commerce where Congress had not preempted the field.

[5] The opinion of the court of appeals contains a concise explanation of the operation of these provisions (506 F. 2d at 142; Pet. App. 7a):

"Title III of the Trade Expansion Act of 1962, recognizing that domestic interests of various kinds may be adversely affected by concessions granted under trade agreements, authorizes the making of compensating adjustments of various kinds. Section 301 (19 U.S.C. § 1901) provides that the Tariff Commission shall undertake investigations of injuries allegedly being done to domestic businesses or workers by such things as increased imports flowing from a trade agreement. After holding public hearings, the Tariff Commission shall make a report to the President. If it affirmatively finds injury to domestic industry, the President may under Section 351 increase or impose tariff duties or other import restrictions. 19 U.S.C. § 1981, or alternatively he may under Section 352 negotiate agreements with foreign governments limiting the export from such countries to the United States of the article causing the injury. 19 U.S.C. § 1981 [*sic*]. If this latter option is taken, the Act provides that the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by the agreement."

The court went on to find that Congress had not preempted the field of non-enforceable, voluntary restraint arrangements with foreign producers, and thus upheld the President's authority to negotiate the arrangements at issue here (352 F. Supp. 1319; Pet. App. 30a–35a).

The court of appeals, one judge dissenting, affirmed, holding that the Trade Expansion Act of 1962, which only pervasively "occupied the field of *enforceable* import restrictions" (Pet. App. 8a, emphasis in original), did not preempt the matter of voluntary restraint agreements and that the President was therefore not precluded from negotiating these arrangements.

Judge Leventhal dissented on narrow grounds. While recognizing that the President possessed a degree of concurrent constitutional power in the foreign commerce field, he concluded that the arrangements were formal and enforceable enough to have been preempted by the Escape Clause provisions of the Trade Expansion Act.[6]

[6] The district court also issued declarations that the United States could not exempt these foreign producers from antitrust liability and that the arrangements were not exempted from the operation of the antitrust laws. The court of appeals ruled that these declarations were improper because there was "nothing in the record that shows the Executive as purporting to grant such an exemption * * *" (Pet. App. 5a) and because petitioner had abandoned this claim by voluntarily dismissing its antitrust count (Pet. App. 6a). Petitioner has disclaimed any interest in pursuing these antitrust issues, and they are not presented by the petition for certiorari (Petition, p. 6).

ARGUMENT

I. THE UNDERLYING CONTROVERSY IS MOOT, AND, IN ANY EVENT, THE ISSUES RAISED BY THE PETITION LACK PROSPECTIVE IMPORTANCE

As petitioner recognizes (Petition, p. 9 at n. 9), the challenged arrangements expired by their own terms on December 31, 1974, after the ruling of the court of appeals and more than two months before the petition for certiorari was filed. It is, of course, axiomatic that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U.S. 244, 246; see *DeFunis* v. *Odegaard,* 416 U.S. 312. Moreover, "an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade,* 410 U.S. 113, 125.

Here, not only have the arrangements expired, they have no continuing collateral consequences affecting either private parties or the government. Moreover, subsequent to the decisions below, Congress repealed or amended the principal sections of the trade laws relied upon by petitioner as prompting the exercise of presidential power in this case. Accordingly, no live controversy presently exists. Enactment of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, has brought into being a statutory framework substantially different from that which prevailed in 1972, when the voluntary restraint arrangements at issue were concluded. The Escape Clause provisions of the Trade Expansion Act of 1962 (19 U.S.C. 1901, 1902,

1981, and 1982) have been superseded; a new Escape Clause mechanism with different procedures and remedies has been established in the Trade Act of 1974.[7] Thus no repetition of the preemption issue here present can occur and the case does not fall within the exception to the mootness doctrine that allows review of short-term activities, "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515.[8]

In view of the expiration of the agreements and petitioner's dependence on the old Escape Clause procedure, the statutory amendment should be dispositive. The dissenting judge in the court of appeals recognized that restraints on foreign commerce involve a "continuum," that the President has undoubted authority over actions falling at the less restrictive end of that continuum (Pet. App. 14a, 17a), and that "[t]his is the critical question in the case—where to draw the line" (*ibid.*). In the present posture of this case, with the arrangements having expired and the

[7] The House Ways and Means Committee noted in its report on H.R. 10710, the Trade Reform Act of 1973, that the Escape Clause provisions of the Trade Expansion Act of 1962 were the subject of a "major revision." H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 44 (1973).

[8] Petitioner also cites cases which hold that voluntary cessation of illegal conduct does not moot a case. *United States* v. *W. T. Grant Co.*, 345 U.S. 629. That line of authority is inapplicable since the parties to the arrangements did not withdraw from them to prevent a judicial decision; they won a declaration of legality, and the arrangements then expired automatically after having been in effect for a full six years, in one form or another. Cf. *DeFunis* v. *Odegaard*, *supra*, 416 U.S. at 318.

Escape Clause having been revised, that process of line drawing with respect to a superseded statute does not merit review by this Court.

The Escape Clause mechanism in the Trade Act of 1974, in substantial respects, differs from the earlier statute. First, the requirement of 19 U.S.C. 1901(b)(1) that increased imports injuring domestic industry result in "major part" from trade concessions was dropped; such injury need no longer result from concessions granted by the United States in trade agreements. The record in this case makes it clear that a reason the government did not consider granting Escape Clause relief in 1972 was that the injury to the steel industry was not concession-related (D.C. Cir. App. 116a). Second, subsection (b) of Section 201 of the 1974 Act makes more liberal the standards for determining injury to a domestic industry because of increased imports from abroad. Where the former law conditioned relief upon a finding that increased imports were in such quantities as to "cause, or threaten to cause, serious injury," the 1974 Act establishes a less strict criterion in providing that the International Trade Commission determine only that increased imports are such as to be a "substantial cause of serious injury, or the threat thereof, to the domestic industry." Third, the Trade Act of 1974 contains a provision (Section 201(b)(2))—entirely new to Escape Clause procedures—which directs the International Trade Commission to take into account all relevant economic factors in making

determinations relating to serious injury or the threat thereof, and sets out a non-exclusive list of such factors. Finally, the Trade Act of 1974 (Section 202) expressly directs the President to provide import relief, after the International Trade Commission has determined that imports are a substantial cause of serious injury, or threat thereof, to a domestic industry, unless he determines that provision of import relief is not in the national economic interest of the United States.[9] Thus, the complicated constitutional issues raised by petitioner cannot again arise in the legal context presented by this case, if at all.[10]

II. THE DECISIONS OF THE COURTS BELOW WERE CORRECT

It has long been recognized that the President has constitutional authority in connection with his power over foreign affairs to seek voluntary export limita-

[9] Moreover, the new trade law contains other provisions which might conceivably have applied to the factual situation which the government faced in 1968 and 1972, and which might have made it unnecessary for the government to seek voluntary arrangements. See Pub. L. 93–618, Sections 102 and 107 (authorizing agreements to reduce non-tariff barriers to and other distortions of international trade, including agreements which permit use of temporary measures to ease adjustment to changes occurring in domestic markets), and Section 301 (authorizing presidential action in response to unfair trade practices by foreign countries).

[10] Moreover, as petitioner's own factual statement makes clear, the original 1968 arrangements and the 1972 extensions all had a duration of three years, ample time for review in situations presenting a live controversy. In this respect, it should be noted that the petitioner did not file its law suit until well after the initial arrangements had expired and the 1972 extensions had become effective and then did not elect to proceed by motion for preliminary injunction or other expedited procedure.

tions of the type at issue here. His foreign relations power extends to issues relating to foreign trade. As this Court held in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, the fact that Congress has concurrent constitutional power with respect to foreign commerce does not preempt the President from exercising his own foreign relations power in that area.[11]

The 1962 Trade Expansion Act gave the President additional authority, beyond his constitutional foreign affairs power, to negotiate government-to-government agreements, enforceable at the Customs House, when trade concessions had seriously injured domestic industries. That legislation was in no way designed to limit the President's power of persuasion and negotiation with entities other than governments—"jawboning" as Judge Danaher, concurring, characterized it below (506 F. 2d 145; Pet. App. 10a)— to achieve less formal and less restrictive resolutions of trade problems than those embodied in the Act. The procedural requirements of the Trade Expansion Act's Escape Clause thus had no application to the Presi-

[11] See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *United States* v. *Pink*, 315 U.S. 203, 222-223, 229-230; *United States* v. *Belmont*, 301 U.S. 324, 330.

dent's actions in negotiating these arrangements with foreign producers to limit steel exports.[12]

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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[12] Nor does the opinion below represent any conflict with the decision of the Fourth Circuit in *United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655, affirmed on other grounds, 348 U.S. 296, which denied judicial enforcement to an executive agreement with Canada respecting the importation of potatoes. Even assuming that the *Capps* decision has continuing vitality, see *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F. 2d 622, 634 n. 16 (Ct. Cl.), it has no application here. *Capps* is an example of an attempt by the Executive Branch to impose sanctions in the foreign trade area without the benefit of legislation. It is simply not relevant to the type of voluntary, unenforceable arrangement, obtained through the use of presidential diplomacy, that was involved here.

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